Supreme Court, U.S.
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In the
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2000

International Brotherhood of Electrical Workers, Local Union No. 46, *Petitioner*,

v.

Trig Electric Construction Co., a Washington corporation; Lydig Construction, Inc.; Fidelity and Deposit Company of Maryland; and Department of General Administration, *Respondents*.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Washington

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PETITION FOR A WRIT OF CERTIORARI

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46 PP

QUESTION PRESENTED

State public works lien statutes typically permit employee benefit plans to recover unpaid benefit contributions from third-party contractors and their surety bonds, neither of which are signatory to collective bargaining agreements. The courts of appeals are in conflict about whether these statutes are preempted by ERISA. Does ERISA preempt these statutes?

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2000

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 46,
Petitioner,

v.

TRIG ELECTRIC CONSTRUCTION CO., A WASHINGTON CORPORATION; LYDIG CONSTRUCTION, INC.; FIDELITY AND DEPOSIT COMPANY OF MARYLAND; AND DEPARTMENT OF GENERAL ADMINISTRATION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

The International Brotherhood of Electrical Workers, Local Union No. 46, respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of the State of Washington in this case.

OPINION BELOW

The opinion of the Washington State Supreme Court (App., *infra,* 1a-22a) is reported at 13 P.3d 622. The state superior court did not issue an opinion explaining its summary

judgment order from which the appeal to the state supreme court was taken. (App., *infra,* 23a, 24a)[1]

JURISDICTION

The Washington Supreme Court entered its judgment on November 16, 2000. (App., *infra,* 1a) The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

Section 514(a) of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1144(a):

> . . . the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan. . . .

ERISA Section 514(c)(1), 29 U.S.C. § 1144(c)(1):

> The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. . . .

Revised Code of Washington (RCW) 39.08.010:

> Whenever any . . . body acting for the state or any county or municipality or any public body shall contract with any person or corporation to do any

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[1] The reported opinion's statement to the contrary is incorrect. (App., *infra,* 4a, n.1) No stated grounds for the trial court's decision appear in the record (App., *infra,* 24a); the "Memorandum Decision" cited in the footnote to the state supreme court's opinion was a letter ruling issued by the trial judge in a different case involving different parties, different facts, and different counsel. (R.215, 216)

work for the . . . municipality, or other public body, city, town, or district, such . . . body shall require the person or persons with whom such contract is made to make, execute, and deliver to such . . . body a good and sufficient bond, with a surety company as surety, conditioned that such person or persons shall faithfully perform all the provisions of such contract and pay all laborers, mechanics, and subcontractors and materialmen, and all persons who supply such person or persons, or subcontractors, with provisions and supplies for the carrying on of such work, which bond in cases of cities and towns shall be filed with the clerk or comptroller thereof, and any person or persons performing such services or furnishing material to any subcontractor shall have the same right under the provisions of such bond as if such work, services or material was furnished to the original contractor. . . .

RCW 60.28.010(1):

Contracts for public improvements or work, other than for professional services, by the state, or any county, city, town, district, board, or other public body, herein referred to as "public body", shall provide, and there shall be reserved by the public body from the moneys earned by the contractor on estimates during the progress of the improvement or work, a sum not to exceed five percent, said sum to be retained by the state, county, city, town, district, board, or other public body, as a trust fund for the protection and payment of any person or persons, mechanic, subcontractor or materialman who shall perform any labor upon such contract or the doing of said work, and all persons who shall supply such person or persons or subcontractors with provisions

and supplies for the carrying on of such work. . . . Every person performing labor or furnishing supplies toward the completion of said improvement or work shall have a lien upon said moneys so reserved. . . .

STATEMENT

The petitioner Union sued in King County, Washington to foreclose its liens for unpaid employee benefit contributions attributable to work performed on a state community college construction project. The foreclosure action was based on Washington's public works lien statutes, RCW 39.08 and 60.28. The state superior court dismissed the petitioner's suit on respondents' motion for summary judgment. The Washington Supreme Court accepted direct review of the case and affirmed the dismissal, deciding in a 5-4 ruling that petitioner's claims were preempted by ERISA.

A. Facts

Under a collective bargaining agreement between Trig Electric Construction Co. and the Union, Trig was required to pay monthly employee benefit contributions to ERISA trust funds on the basis of hours worked by its employees. Trig subcontracted with respondent Lydig Construction, Inc. to perform the electrical work on a construction project at Bellevue Community College.

As required by RCW 39.08, Lydig obtained a surety bond from respondent Fidelity and Deposit Company of Maryland to protect, among others, all workers performing labor on the project. And under RCW 60.28, respondent Department of General Administration withheld a retainage trust fund from Lydig earmarked for the protection and payment of those workers. When Trig became delinquent in making its

contributions to the trust funds, the Union filed lien notices against the bond and retainage in accordance with the statutes.

B. Procedural History

The Union sued to foreclose its liens under the statutes in October 1998. Respondents Lydig and Fidelity filed a motion for summary judgment seeking dismissal of the Union's action. As one of the grounds for their motion, the respondents argued that the Union's claims were preempted by ERISA. In support of their argument, the respondents cited *Puget Sound Electrical Workers Health & Welfare Trust Fund v. Merit Co.*, 123 Wn.2d 565, 870 P.2d 960 (1994), in which the Washington Supreme Court first held that the state public works lien statutes were preempted by ERISA. (R.36-39) In opposition to the motion, the Union argued that in view of this Court's decision in *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645 (1995), the trial court should disregard *Merit* and conclude that ERISA no longer preempted the statutes. (R.188-192)

The trial court entered only an order dismissing the action (App., *infra*, 24a) without any written explanation of its decision (*see* footnote 1 at page 2, *supra*). The Union filed a petition for direct review by the state Supreme Court, requesting that the court reexamine and overrule *Merit* in view of *Travelers*. The Supreme Court accepted review of the appeal.

C. Summary of Opinion Below

Five of the nine Washington Supreme Court justices found that ERISA continues to preempt the public works lien statutes, and that the court's previous decision to that effect in *Merit* remains good law.

The majority began its analysis by summarizing the reasoning underlying the *Merit* decision. In that case, the court noted that under ERISA's preemption provision, ERISA preempts any state laws that "relate to any employee benefit plan. . ." ERISA Section 514(a), 29 U.S.C. § 1144(a). Under the test stated in *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983), a statute "relates to" ERISA "if it has a connection with or reference to such a plan." *Shaw,* 463 U.S. at 97. The *Merit* court concluded that the lien statutes "connect with" and thus "relate to" ERISA because they "create an entirely separate cause of action against the general contractors who otherwise have no contractual obligation to the plans." *Merit,* 870 P.2d at 963-64. Thus, the statutes "provide alternative enforcement mechanisms to those provided by Congress when it enacted ERISA," and are therefore preempted. (App., *infra,* 8a)

The majority then considered whether *Merit* remains good law in view of this Court's subsequent decisions in *Travelers, supra; California Division of Labor Standards Enforcement v. Dillingham Constr., N.A.,* 519 U.S. 316 (1997); and *De Buono v. NYSA-ILA Medical & Clinical Services Fund,* 520 U.S. 806 (1997). The majority observed that in a recent prior decision, the Washington Supreme Court acknowledged that "[t]he effect of *Travelers* and its progeny favors a retreat from the expansive preemption doctrine this court has previously followed to ensure ERISA's objective of protecting workers..." *In re Estate of Egelhoff,* 139 Wn.2d 557, 989 P.2d at 87 (1999), *cert. granted,* ___ U.S. ___, 120 S.Ct. 2687, 147 L.Ed.2d 960 (2000). Nevertheless, the majority distinguished *Egelhoff* on its facts and pointed to "alternative enforcement mechanism" language in *Travelers* itself to uphold preemption of the lien statutes: "'state laws providing alternative enforcement mechanisms also relate to ERISA plans, triggering pre-emption.' *Travelers Ins. Co.,* 514 U.S. at 658, 115 S.Ct. 1671 (citing *Ingersoll-Rand Co. v. McClendon,* 498 U.S. 133, 111 S.Ct. 478, 112 L.Ed.2d 474 (1990)." (App., *infra,* 10a)

The majority also distinguished post-*Travelers* cases in other jurisdictions finding no preemption. In each of the three cases cited, the employers themselves, and not third-party contractors, were the defendants in bond foreclosure actions, so the statutes involved did not expand ERISA remedies. *Greenblatt v. Delta Plumbing & Heating Corp.*, 68 F.3d 561 (2d Cir. 1995); *Bd. of Trustees of Operating Eng'rs Local 825 Fund Serv. Facilities v. L.B.S. Constr. Co.*, 148 N.J. 561, 691 A.2d 339 (1997); *Operating Eng'rs Health & Welfare Trust Fund v. JWJ Contracting Co.*, 135 F.3d 671 (9th Cir. 1998). The majority finally distinguished this Court's decisions in *De Buono* and *Dillingham, supra,* as factually inapposite.

The majority concluded that under the principle of stare decisis, the Union had not met its burden of clearly showing that *Merit* is sufficiently incorrect and harmful to warrant being overruled. The court found that ERISA preempts the Union's lien foreclosure action and dismissed the case accordingly. (App., *infra,* 14a)

The four dissenting justices opined that this Court, in *Travelers, supra,* abandoned the preemption analysis on which the majority relied. Further, an analysis of cases decided after *Travelers* reveals that the remedy provided by the public works lien statutes is only remotely connected to ERISA, so the Union's claim is not preempted.

The dissent pointed out that before *Travelers,* this Court relied on an expansive and literal interpretation of ERISA's preemption clause, finding that state laws having even remote effects on ERISA plans were preempted. *Shaw,* 463 U.S. at 97. But in *Travelers,* this Court retreated from and abandoned that approach, finding that state laws having only a "'tenuous, remote, or peripheral' connection with covered plans" do not merit preemption. *Travelers,* 514 U.S. at 661. State courts should now look to the "objectives of the ERISA statute as a

guide to the scope of the state law that Congress understood would survive." *Travelers,* 514 U.S. at 656. Applying these objectives in this case leads inescapably to the conclusion that Congress never intended employers to use ERISA to shield themselves from paying employee benefits.

According to the dissent, Congress enacted ERISA to remedy the "'mismanagement of funds accumulated to finance employee benefits and the failure to pay employees benefits from accumulated funds.'" *Dillingham,* 519 U.S. at 326-27, quoting *Massachussets v. Morash,* 490 U.S. 107 (1989). But Congress did not intend that ERISA preemption displace the traditional presumption against federal preemption of state law. *Travelers,* 514 U.S. at 655. Both the Ninth Circuit Court of Appeals and the Washington Supreme Court have adopted the *Travelers* analysis. *JWJ Contracting, supra,* 135 F.3d 671 (9th Cir. 1998); *Egelhoff, supra,* 139 Wn.2d 557, 989 P.2d 80 (1999), *cert. granted,* ___ U.S. ___, 120 S.Ct. 2687, 147 L.Ed.2d 960 (2000).

According to the dissenting justices, the majority erred in distinguishing *Egelhoff* from this case on the basis of the different statute involved. Rather, the result in this case differs from *Egelhoff* only because the majority applied the anachronistic pre-*Travelers* analysis that governed the decision in *Merit.* This Court has cautioned against that approach, noting the importance of giving "proper weight to *Travelers'* rejection of a strictly literal reading of § 514(a)." *De Buono,* 520 U.S. at 812-13.

The dissent also stated that the majority "seriously misrepresents" the Ninth Circuit's *JWJ Contracting* decision. (App., *infra,* 18a) Rather than affirming the continuing authority of its pre-*Travelers* decisions in *Trs. of Elec. Workers Health & Welfare Trust v. Marjo Corp.,* 988 F.2d 865 (9th Cir. 1992) and *Carpenters Health & Welfare Trust Fund v. Tri*

Capital Corp., 25 F.3d 849 (9th Cir. 1994), the *JWJ* court stated instead that the *Marjo* and *Tri Capital* decisions relied on "expansive language from the Supreme Court demonstrating an understanding of ERISA pre-emption that has since been tailored to better fit Congress's policy intentions." *JWJ Contracting,* 135 F.3d at 679.

According to the dissenting opinion, the majority upheld *Merit* primarily because *Travelers* affirmed this Court's previous holding in *Ingersoll-Rand Co. v. McClendon,* 498 U.S. 133 (1990), that ERISA preempted a Texas state law providing an alternative enforcement mechanism. *Ingersoll-Rand* is distinguishable from this case, however, because the law at issue in that case was "'specifically designed to affect employee benefit plans. . . .'", *Ingersoll-Rand,* 498 U.S. at 140. The Washington public works lien laws, on the other hand, are laws of general applicability available to an entire class of creditors, irrespective of the existence of an ERISA plan.

The dissent went on to endorse the reasoning of the Hawaii Supreme Court in finding that Hawaii's lien laws were not preempted. In *Haw. Laborers' Trust Funds v. Maui Prince Hotel,* 81 Hawaii 487, 918 P.2d 1143 (1996), the court reviewed ERISA's legislative history and concluded that preemption of the lien statutes was inconsistent with ERISA's objective of protecting workers. To rule otherwise would "ignore federal policy and fly in the face of logic." *Haw. Laborers,* 81 Hawaii at 500, 918 P.2d 1143.

In conclusion, the dissenting opinion observed that because the lien statutes are laws of general applicability having only tenuous connections to ERISA plans and making no reference to such plans, the *Merit* decision is superseded by *Egelhoff* and *Travelers.* Having failed to meet its burden to prove Congress intended to supplant Washington's lien laws,

the respondents are not entitled to a finding of ERISA preemption. (App., *infra,* 21a, 22a)

REASONS FOR GRANTING THE PETITION

The question presented in this case has been percolating through both the state and federal appellate courts for more than a decade. Nevertheless, despite the guidance provided by this Court in *Travelers, supra,* 514 U.S. 645 (1995), the courts continue to be in conflict about whether third-party lien statutes fall within ERISA's preemptive reach. Only this Court can resolve the issue to effect uniform treatment of construction industry workers, employee benefit plans, and general contractors and their sureties throughout the United States. In addition to the national importance of the issue it addresses, the close decision below is erroneous.

I. The Washington Supreme Court's Finding of Preemption Conflicts With Post-*Travelers* Decisions by the First Circuit Court of Appeals and the Hawaii Supreme Court

On June 16, 2000, only four days before the oral argument below in this case (App., *infra,* 1a), the First Circuit Court of Appeals decided *Carpenters Local Union No. 26 v. U.S. Fidelity & Guaranty Co.,* 215 F.3d 136 (1st Cir. 2000), in which it found that the Massachusetts bond statute, which is substantially similar to RCW 39.08, is not preempted by ERISA. The First Circuit reexamined its contrary decision in *Williams v. Ashland Engineering Co., Inc.,* 45 F.3d 588 (1st Cir. 1995), and concluded that in view of this Court's subsequent decisions in *Travelers, supra,* 514 U.S. 645 (1995); *Dillingham, supra,* 519 U.S. 316 (1997); and *DeBuono, supra,* 520 U.S. 806 (1997), the bond statute was no longer preempted: "Taking a fresh look at the Massachusetts bond statute and giving due weight to *Travelers* and its progeny, we conclude that USF&G [the surety

defendant] has not overcome the starting presumption against preemption." *Carpenters,* 215 F.3d at 145.

The decision below also conflicts with a post-*Travelers* state supreme court decision. In *Haw. Laborers' Trust Funds v. Maui Prince Hotel,* 81 Haw. 487, 918 P.2d 1143 (1996), the Hawaii Supreme Court examined Congress's purposes in enacting ERISA. Noting that "Congress never intended to prevent [ERISA] trust funds from using any neutral state statute that did not relate to employee benefit plans," 918 P.2d at 1155, the court concluded that Hawaii's mechanic's and materialman's lien statute was not preempted by ERISA.

Despite *Travelers,* 514 U.S. 645 (1995), the courts have reached conflicting results on the question presented since at least 1989, when the Wisconsin Court of Appeals held that the Wisconsin mechanic's lien statute was not preempted. *Plumber's Local 458 Holiday Vacation Fund v. Howard Immel, Inc.,* 445 N.W.2d 43 (Wis.App. 1989). Significantly, however, apart from only the decision below and *Plumbing Industry Bd. v. E.W. Howell Co.,* 126 F.3d 61 (2d Cir. 1997), all of the reported decisions finding preemption of third-party lien and bond statutes were issued before this Court's decision in *Travelers.*[2] With the noted exceptions, appellate decisions after

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[2] *See, e.g., Bricklayers Local 33 Benefit Funds v. America's Marble Source,* 950 F.2d 114 (3d Cir. 1991) (finding preemption of New Jersey Construction Workers' Fringe Benefit Security Act); *Trustees of the Elec. Workers Health & Welfare Trust v. Marjo Corp.,* 988 F.2d 865 (9th Cir. 1993) (finding preemption of Nevada general contractor liability statute); *Carpenters Health & Welfare Trust Fund v. Tri Capital Corp.,* 25 F.3d 849 (9th Cir. 1994) (California stop notice remedy preempted). Although *Williams v. Ashland Engineering Co., supra,* 45 F.3d 588 (1st Cir. 1995) was decided several months after this Court's decision in *Travelers,* the *Williams* court found preemption without making any reference to *Travelers.* In any event, *Williams* was overturned last year by *Carpenters v. U. S. Fidelity, supra,* 215 F.3d 136 (1st Cir. 2000), which took *Travelers* into account.

Travelers have found that these statutes are not preempted.[3]

Unless this Court provides guidance, the lower courts will continue to be split on whether lien laws are available to ERISA plans and their beneficiaries for the recovery of benefit contributions. The Court should take this opportunity to bring uniformity to a sphere of ERISA jurisprudence that currently resembles a patchwork quilt.

II. Because It Affects Thousands of Construction Industry Workers Across the United States, the Question Presented Is Important

Fundamentally at issue in this case is whether construction-industry employees who are ERISA plan beneficiaries can expect to receive their full benefits when their subcontractor employers become insolvent.[4] One commentator has observed that in 1997, approximately 29 percent of the national payroll for the construction industry consisted of benefit contributions. Of this percentage, more than eight

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[3] *See, e.g., Michigan Laborers Health Care Fund v. Seaboard Surety Co.*, 137 F.3d 427 (6th Cir. 1998) (finding no preemption of Michigan Public Works Act); *Hawaii Laborers, supra*, 918 P.2d 1143 (1996); *Carpenters v. U.S. Fidelity, supra*, 215 F.3d 136 (1st Cir. 2000).

[4] This Court has acknowledged that an ERISA pension plan must award credit to employees for hours worked regardless of whether employer contributions have been received. *Central States, Southeast & Southwest Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 567 n.7 (1985). But since there are no minimum participation, vesting, and benefit accrual standards for health and welfare funds, those funds are not required to provide eligibility for health coverage when contributions are not paid. Sackman, *Lien On: The Story of the Elimination and Return of Mechanic Lien, Stop Notice and Bond Remedies for Collection of Contributions to Employee Benefit Funds*, 20 Berkeley Journal of Employment and Labor Law 254, 280 n. 174 (1999).

percent of the contributions due went unpaid, for an estimated total of more than four billion dollars nationally. Sackman, *Lien On, supra,* at 282. This number would be substantially reduced, if not altogether eliminated, if the lien laws were made universally available for the recovery of unpaid contributions.

Review of the decision below is also important because it will resolve the nationwide proliferation of litigation over the question presented. If the Court decides this question, the lower courts, contractors and their sureties, and employee benefit plans and their beneficiaries need no longer devote their time and resources to this issue. The result will be a more uniform body of benefits law, which is, after all, one of the primary purposes of ERISA's preemption provision. *Ingersoll-Rand Co. v. McClendon, supra,* 498 U.S. 133, 142 (1990).

III. The 5-to-4 Decision Below Is Erroneous

As explained in the dissenting opinion of the decision below (App., *infra,* 14a-22a), the majority opinion does not fully take into account the change in ERISA preemption analysis wrought by *Travelers, supra,* 514 U.S. 645 (1995). Although *Travelers* cited to *Ingersoll-Rand Co. v. McClendon, supra,* 498 U.S. 133 (1990), for the proposition that state laws providing alternative enforcement mechanisms are preempted, *Ingersoll-Rand* is distinguishable under the *Travelers* analysis.

Under *Travelers,* courts must start with the presumption that Congress did not intend to supplant state law, and then consider the "objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive." *Travelers,* 514 U.S. at 654, 656. Finally, state laws having only a "tenuous, remote, or peripheral" connection with ERISA plans are not preempted. *Travelers,* 514 U.S. at 661.

Ingersoll-Rand is distinguishable from this case because it involved a common-law wrongful termination cause of action based on an employer's desire to prevent his employee from acquiring pension benefits under an ERISA plan. *Ingersoll-Rand,* 498 U.S. at 137-39. The cause of action was therefore "specifically designed to affect employee benefit plans," *Ingersoll-Rand,* 498 U.S. at 140, in contrast to the lien statutes, which are laws of general application having only a remote connection with ERISA. Under *Travelers,* these characteristics trump the statutes' status as an alternative enforcement mechanism, so they are not preempted.

Further, the decision below is erroneous because it defies the intentions of Congress in enacting ERISA. The statute itself declares that "the policy of [ERISA is] to protect . . . the interests of participants in employee benefit plans. . . ." ERISA § 2(b), 29 U.S.C. § 1001(b). Preemption of ERISA-neutral state lien laws only hampers those interests. Moreover, the legislative history underlying the Multiemployer Pension Plan Amendments Act of 1980, codified at ERISA § 515, 29 U.S.C. § 1145, underscores Congress's intention that traditional statutory lien remedies not be preempted: "The Committee amendment does not change any other type of remedy permitted under State or Federal Law with respect to delinquent multiemployer plan contributions." H.R. Rep. No. 869, 96 Cong., 2d Sess. (1986) (Part II), reprinted in 1980 U.S. Code Cong. & Admin. News 2918, 3037-38. The Court should therefore embrace this opportunity to align its ERISA preemption analysis with Congress's policy intentions.

Finally, the decision below is erroneous because it subjects employees on public works projects who are ERISA plan participants to disparate treatment in comparison with non-ERISA employees. The latter are typically nonunion employees entitled under the prevailing wage statutes to compensation comprising both wages and benefits. The former category

consists primarily of unionized employees who receive wages in accordance with a collective bargaining agreement and benefits from ERISA plans funded by employer contributions. When ERISA trust funds are denied the use of the lien statutes to recover unpaid contributions, the practical effect is to deny union employees the value of health and other benefits that nonunion employees are entitled to recover under the prevailing wage statutes. Because this disparate treatment is wrong as a matter of public policy, the Court should grant the petition.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A
TO
PETITION FOR CERTIORARI

OPINION OF
THE SUPREME COURT OF THE STATE OF
WASHINGTON

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 46,
Appellant,

v.

TRIG ELECTRIC CONSTRUCTION CO., a Washington corporation; LYDIG CONSTRUCTION, INC.; FIDELITY AND DEPOSIT COMPANY OF MARYLAND; and DEPARTMENT OF GENERAL ADMINISTRATION,
Respondents.

No. 68504-5

En Banc

Argued June 20, 2000
Decided November 16, 2000

SANDERS, J. — We here review an order of the King County Superior Court granting the motion of Lydig Construction Company and the Fidelity and Deposit Company of Maryland to dismiss the complaint of the International Brotherhood of Electrical Workers on summary judgment. Finding no issue of material fact and holding Lydig and Fidelity are entitled to judgment as a matter of law, we affirm the trial court's dismissal of appellant's claim on federal preemption grounds.

FACTS

Background

Appellant is Local Union No. 46 of the International Brotherhood of Electrical Workers (IBEW). Respondents are Lydig Construction, Inc. (Lydig), Fidelity and Deposit Company of Maryland (Fidelity), and Washington State Department of General Administration (GA). Trig Electrical Construction Co. (Trig) was Lydig's subcontractor. IBEW seeks to foreclose Lydig's general contractor's bond posted by Fidelity.

Lydig is a general construction contractor and has been doing business for over 40 years. It has been responsible for several notable building projects at leading educational institutions in this state. At issue here is Lydig's contract to build the State Archives Project at Bellevue Community College. Trig subcontracted with Lydig to perform the project's electrical work.

As required by RCW 39.08, Lydig acquired a surety bond from Fidelity to protect all workers, mechanics, subcontractors, and materialmen supplying material and performing labor on the project. Pursuant to RCW 60.28, the college withheld a portion of the contract price as a retainage trust fund.

A collective bargaining agreement between IBEW and Trig required Trig to contribute a portion of its workers' wages to benefit trust fund plans falling under the ambit of the federal Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001-1461. Trig became delinquent on these contributions for the months of December 1997 and January 1998.

On March 24, 1998, IBEW filed a lien notice asserting a claim against Lydig's bond and retainage trust fund for Trig's unpaid employee benefit contributions. On July 22, 1998, IBEW filed an amended lien notice identical to the previous notice except for the amount of interest and attorney fees claimed.

Procedural History

IBEW filed its lien foreclosure action against Lydig on October 27, 1998, for the required but unpaid contributions to the employee benefit funds. On July 9, 1999, Lydig and Fidelity moved for summary judgment arguing IBEW had no standing to foreclose on the lien and that ERISA preempted the action in any event. On August 6, 1999, the trial court granted defendants' motion for summary judgment and dismissed IBEW's complaint on the grounds that the lien notices were deficient and IBEW lacked standing to sue on behalf of Trig employees. IBEW timely filed a notice of appeal to the Supreme Court and we accepted review of this direct appeal.

ISSUE[1]

The dispositive issue before the court is whether ERISA preempts IBEW's lien foreclosure action under *Puget Sound Elec. Workers Health & Welfare Trust Fund v. Merit Co.*, 123 Wn.2d 565, 870 P.2d 960 (1994), and if so, should we overrule *Merit*?

DISCUSSION

Standard of Review on Summary Judgment

It is well settled that we review the record on summary judgment de novo, engaging in the same inquiry as the trial court. *Benjamin v. Wash. State Bar Ass'n*, 138 Wn.2d 506, 515, 980 P.2d 742 (1999). Because our review is de novo, we are free to premise our holding affirming summary judgment on an issue not decided by the trial court. *See Redding v. Va. Mason Med. Ctr.*, 75 Wn.App. 424, 426, 878 P.2d 483 (1994) (an appellate court may affirm a trial court's disposition of a summary judgment motion on any basis supported by the record); *see also LaMon v. Butler*, 112 Wn.2d 193, 200-01, 770 P.2d 1027 (1989). Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Clements v. Travelers Indem. Co.*, 121 Wn.2d 243, 249, 850 P.2d 1298 (1993); CR 56(c).

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[1] IBEW assigns error generally to the trial court's dismissal of its case in summary judgment. While the parties brief the specific grounds for which the trial court granted summary judgment, viz., that IBEW lacked standing to bring the foreclosure action under RCW 39.08 and RCW 60.28, *see* Clerk's Papers (CP) at 215-16 (Memorandum Decision), the standing issue is not essential to our holding. We therefore pass to the ERISA preemption question.

There are no disputed material facts in this case. Rather we must determine a pure question of law: whether ERISA preempts IBEW's lien foreclosure action, which question turns on the continued validity of *Merit*. As counsel for Appellant conceded at oral argument, we must overrule *Merit* for IBEW to prevail.

The Continuing Validity of Merit

In a factually similar matter, this court six years ago unanimously held Washington's public works lien statutes, RCW 39.08 and RCW 60.28, which provide a mechanism for collection of a defaulting subcontractor's obligations from the general contractor, are preempted by ERISA. *Merit,* 123 Wn.2d 565, 870 P.2d 960.

RCW 39.08 requires the execution and delivery of a performance bond with respect to public works construction projects:

> Whenever any . . . body acting for the state or any county or municipality or any public body shall contract with any person or corporation to do any work for the . . . municipality, or other public body, city, town, or district, such . . . body shall require the person or persons with whom such contract is made to make, execute, and deliver to such . . . body a good and sufficient bond, with a surety company as surety, conditioned that such person or persons shall faithfully perform all the provisions of such contract and pay all laborers, mechanics, and subcontractors and materialmen, and all persons who supply such person or persons, or subcontractors, with provisions and supplies for the carrying on of such work, which bond in cases of cities and towns shall be filed with the clerk or comptroller thereof, and any person or

> persons performing such services or furnishing material to any subcontractor shall have the same right under the provisions of such bond as if such work, services or material was furnished to the original contractor. . . .

RCW 39.08.010. Relating thereto, RCW 60.28 requires the public body reserve a retainage fund from the money otherwise due the general contractor:

> Contracts for public improvements or work, other than for professional services, by the state, or any county, city, town, district, board, or other public body, herein referred to as "public body," shall provide, and there shall be reserved by the public body from the moneys earned by the contractor on estimates during the progress of the improvement or work, a sum not to exceed five percent, said sum to be retained by the state, county, city, town, district, board, or other public body, as a trust fund for the protection and payment of any person or persons, mechanic, subcontractor or materialman who shall perform any labor upon such contract or the doing of said work, and all persons who shall supply such person or persons or subcontractors with provisions and supplies for the carrying on of such work. . . . Every person performing labor or furnishing supplies toward the completion of said improvement or work shall have a lien upon said moneys so reserved: . . . .

RCW 60.28.010(1).

Section 514(a) of ERISA states with respect to state laws:

> Except as provided in subsection (b) of this section, the provisions of this subchapter and

> subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title.

29 U.S.C. § 1144(a)(1994). Furthermore, "[t]he term 'State law' includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State." 29 U.S.C. § 1144(c)(1).

In *Merit,* a group of benefit trust funds sued, as does IBEW herein, under RCW 39.08 and RCW 60.28 to foreclose on a lien against a general contractor's bond for unpaid benefit plan contributions owed to employees by an insolvent subcontractor. *Merit,* 23 Wn.2d at 567-68, 870 P.2d 960. We held the lien foreclosure actions were preempted by ERISA. *Id.* at 573, 870 P.2d 960.

To determine whether the public works lien statutes "relate to" ERISA for the purposes of 29 U.S.C. § 1144(a), we looked to the test of *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 103 S.Ct. 2890, 77 L.Ed.2d 490 (1983). Under *Shaw*, a statute may "relate to" ERISA "if it has a connection with or reference to such a plan." *Shaw*, 463 U.S. at 97, 103 S.Ct. 2890.

We believed the Washington public works lien statutes "connect with" and therefore "relate to" ERISA because they

> create an entirely separate cause of action against the general contractors who otherwise have no contractual obligation to the plans. Furthermore, they provide a mechanism for funding employee benefit plans not available under the provisions of ERISA.

Merit, 123 Wn.2d at 572, 870 P.2d 960. Therefore the "enforcement and collection mechanisms [of the lien statutes] must yield to the extent they supplement those provided by ERISA." *Id.* at 573, 870 P.2d 960.

The civil enforcement mechanisms of ERISA are set forth at 29 U.S.C. § 1132 (1994) and specifically empower a participant, beneficiary, or fiduciary of a benefit plan to bring a civil action to enforce the terms of the plan. 29 U.S.C. § 1132(a)(3)(B)(ii)(1994). Furthermore 29 U.S.C. § 1145 governs delinquent contributions *by employers* to employee benefit plans as set forth in collective bargaining agreements. In a nonpreempted enforcement action, then, a party would use 29 U.S.C. § 1132(a) to enforce 29 U.S.C. § 1145 against the delinquent employer.

As we understood in *Merit,* to the extent the public works lien statutes provide an enforcement mechanism by imposing liabilities on general contractors' bonds and retainage funds for the delinquent benefit plan payments of a subcontractor, they provide alternative enforcement mechanisms to those provided by Congress when it enacted ERISA. The state statutes, then, undeniably "relate to" and "connect with" ERISA for the purposes of ERISA's preemption provision. 29 U.S.C. § 1144(a) (1994).

Under the holding of *Merit,* then, IBEW's action to enforce and collect on its lien against Lydig and Fidelity for Trig's delinquent payments into the employee benefit funds is preempted by ERISA. As noted above, IBEW's counsel conceded as much at oral argument. The question is, then, have subsequent developments in the law occurred which undermine our holding in *Merit*? IBEW argues both the United States Supreme Court and the Washington Supreme Court have departed from the strict rule of *Merit* that alternate enforcement

mechanisms are preempted. Lydig and Fidelity argue *Merit* remains good law.

Not long after *Merit*, the United States Supreme Court in a series of cases attempted to develop a more helpful framework than *Shaw's* "refer to or connect with" test. IBEW cites *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 115 S.Ct. 1671, 131 L.Ed.2d 695 (1995) for the proposition that the Supreme Court jettisoned a broad interpretation of ERISA preemption. Indeed, the Supreme Court later harkened back to *Travelers* for the proposition Congress in enacting ERISA's preemption clause did not intend to supplant existing state law. *De Buono v. NYSA-ILA Med. & Clinical Servs. Fund*, 520 U.S. 806, 117 S.Ct. 1747, 138 L.Ed.2d 21 (1997) (citing *Travelers Ins. Co.*, 514 U.S. at 654-55). IBEW argues that after *Travelers*, overruling *Merit* would simply restore the status quo ante with respect to the public works lien statutes and employee benefit plans.

Last fall, in *In re Estate of Egelhoff*, 139 Wn.2d 557, 989 P.2d 80 (1999), *cert. granted*, 120 S.Ct. 2687 (2000), we took up the issue of whether ERISA preempted a Washington statute (RCW 11.07.010) giving children of decedents rights to the proceeds of employment-based life insurance plans. After a detailed analysis of the federal case law prior to and since *Travelers* we concluded, "The effect of *Travelers* and its progeny favors a retreat from the expansive preemption doctrine this court has previously followed to ensure ERISA's objective of protecting workers and Washington's sovereign interest in exercising its traditional police powers in the area of domestic relations and family law." *Egelhoff*, 139 Wn.2d at 570-71, 989 P.2d 80. This language (". . . the expansive preemption doctrine this Court has previously followed . . . .") bears on the validity of *Merit* by implication.

However IBEW places a great deal of emphasis on this kind of retreat language without analyzing the salient features of this case vis-à-vis *Travelers, Egelhoff,* and the cases from other jurisdictions which arguably retreat from a broad reading of ERISA's preemption language.

Travelers itself expressly contemplates ERISA preemption in a case such as this where a state statute provides an enforcement mechanism for funding an ERISA plan supplemental to the provisions of ERISA itself. In *Travelers,* the Supreme Court expressly noted "state laws providing alternative enforcement mechanisms also relate to ERISA plans, triggering pre-emption." *Travelers Ins. Co.,* 514 U.S. at 658 (citing *Ingersoll-Rand Co. v. McClendon,* 498 U.S. 133, 111 S. Ct. 478, 112 L.Ed.2d 474 (1990)). *Travelers Ins. Co.,* the case on which IBEW would have us overrule *Merit,* actually reaffirms the appropriateness of ERISA preemption in this kind of case.

Furthermore, *Egelhoff* is distinguishable from this case because here our task, as in *Merit,* involves delving into the relationship between Washington's public works lien statutes and ERISA, not the statute dealing with the distribution of nonprobate assets upon dissolution of marriage.

Even *Egelhoff* noted the distinction between it and those cases where "a state law which directly or indirectly invades the core functions of ERISA regulation must give way to the comprehensive federal scheme favored by Congress under the four-factor approach of the Court of Appeals for the Ninth Circuit." *Egelhoff,* 139 Wn.2d at 575 n.93, 989 P.2d 80 (referencing identification of "four factors to determine whether a state law has a 'connection with' an ERISA benefit plan. . . .") (citing *Aloha Airlines, Inc. v. Ahue,* 12 F.3d 1498, 1504 (9th Cir. 1993)).

After an analysis of the same "connection with" case the Ninth Circuit followed in *Aloha Airlines,* we decided in *Merit* that RCW 39.08 and RCW 60.28 manifest a substantive invasion into the field ERISA occupies by creating a separate cause of action against general contractors otherwise without liability to the employees of a subcontractor under the benefit plans and by providing a non-ERISA enforcement mechanism for funding the plans. *Merit,* 123 Wn.2d at 572, 870 P.2d 960. Nothing in substantive ERISA law has changed in the intervening years between *Merit* and this case that alters our conclusion. As noted above, the public works lien statutes "directly or indirectly invade[ ] the core functions of ERISA regulation" by providing a civil enforcement mechanism beyond what Congress specified in ERISA. *See generally* 29 U.S.C. § 1132(a)(3).

Post-*Travelers* ERISA preemption decisions in other jurisdictions upon which IBEW relies are equally unpersuasive.

Several cases upon which IBEW relies involve general contractors liable on their bonds *as employers. See Greenblatt v. Delta Plumbing & Heating Corp.,* 68 F.3d 561 (2d Cir. 1995) (ERISA did not preempt a surety bond claim against an employer's bond to enforce the terms of a collective bargaining agreement when employer was delinquent on benefit payments). However the Second Circuit noted, "Pre-emption may be proper, for example, when state laws 'mandate[ ] employee benefit structures or their administration' or '*provid[e] alternative enforcement mechanisms*' to § 502(a)." *Greenblatt,* 68 F.3d at 574 (alteration in original) (emphasis added) (quoting *Travelers Ins. Co.,* 514 U.S. at 658). *See also Bd. of Trustees of Operating Eng'rs Local 825 Fund Serv. Facilities v. L.B.S. Constr. Co.,* 148 N.J. 561, 691 A.2d 339 (1997) (ERISA did not preempt foreclosure action against a general contractor's bond for the general contractor's delinquent payments to a fringe benefit plan); *Operating Eng'rs Health & Welfare Trust Fund v.*

JWJ Contracting Co., 135 F.3d 671 (9th Cir. 1998) (same). These cases are distinguishable because the bond foreclosure actions were against the delinquent employers themselves and did not attempt to shift liability to fund an ERISA plan to a third party. There is a significant difference between plaintiffs enforcing their rights against their employer's bond as opposed to applying a state lien law to recover benefit contributions from a third party to the contract rather than enforce rights under a contract.

Notably, the Ninth Circuit in *JWJ* distinguished itself from a case like ours:

> The statutes involved in both *Marjo* and *Tri Capital* provided remedies against third parties who never directly agreed to make contributions to ERISA trust funds when the employer failed to do so. By making additional parties liable to plan employees, these state statutes expand remedies by offering additional substantive mechanisms beyond what was contemplated by ERISA to solve the problem for which ERISA was created. In contrast, as JWJ's surety, Continental's contractual agreement to issue payment bonds transfers the obligation from the employer to its underwriter, for the protection of employees, and does not expand the remedies provided or contemplated by ERISA. This contractual relationship merely substitutes obligors.

JWJ Contracting Co., 135 F.3d at 679. Yet, as we succinctly described in *Merit:*

> By imposing liability upon general contractors who have not agreed to make contributions to ERISA funds, Washington's public works lien statutes regulate how ERISA plans are funded. Consequently,

> they relate to ERISA benefit plans and the provisions of ERISA that address the nonpayment of contributions by employers to employee benefit plans.

Merit, 123 Wn.2d at 572, 870 P.2d 960.

Some recent United States Supreme Court cases cited by IBEW, and upon which we relied in *Egelhoff*, 139 Wn.2d at 569-70, 989 P.2d 80, are simply inapposite. *See, e.g., De Buono*, 520 U.S. 806, 117 S.Ct. 1747, 138 L.Ed.2d 21 (ERISA does not preempt a New York state gross receipts tax on hospitals); *Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., N.A.*, 519 U.S. 316, 117 S. Ct. 832, 136 L. Ed. 2d 791 (1997) (ERISA does not preempt a California statute prohibiting a contractor on a public works project from paying an apprentice wage to an apprentice trained in an unapproved apprenticeship program). These cases differ from the instant case because, insofar as a lien foreclosure action under our public works lien statutes permits an alternative funding mechanism for the ERISA plans, such interferes with their administration well beyond the disparate fact patterns before the Supreme Court in *De Buono* and *Dillingham*.

In sum, the post-*Merit* and post-*Travelers* authority IBEW cites simply do not take this case outside of the preemptive scope of ERISA as recognized explicitly even in *Travelers* itself.

Stare Decisis

Stare decisis "'requires a clear showing that an established rule is incorrect and harmful before it is abandoned.'" *Waremart, Inc. v. Progressive Campaigns, Inc.*, 139 Wn.2d 623, 634, 989 P.2d 524 (1999) (quoting *In re Rights to Waters of Stranger Creek*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970)). By failing to demonstrate a change in ERISA's preemptive force

over state statutes providing an alternative enforcement mechanism to 29 U.S.C. § 1132(a), IBEW has not met this substantial burden. *Merit* remains good law.

CONCLUSION

Accordingly we decline IBEW's invitation to overrule *Merit*. We hold ERISA preempts the union's lien foreclosure action against Lydig and Fidelity to enforce Trig's duty under federal law to make payments to its unionized employee's ERISA-governed benefit plans. We affirm the trial court's summary judgment order and dismiss the case. Respondents shall recover their costs on appeal.

GUY, C.J., MADSEN, ALEXANDER, and BRIDGE, JJ., concur.

JOHNSON, J. (dissenting) — The majority relies upon a preemption analysis the United States Supreme Court has abandoned. *See N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 115 S. Ct. 1671, 131 L. Ed.2d 695 (1995). Applying the wrong analytical approach, the majority erroneously concludes that a case decided prior to *Travelers* is determinative. *See* majority at 625 (citing *Puget Sound Elec. Workers Health & Welfare Trust Fund v. Merit Co.*, 123 Wn.2d 565, 870 P.2d 960 (1994)). Moreover, in an attempt to strengthen its result, the majority relies upon cases that do not support its conclusion. A careful analysis of case law following *Travelers* reveals, however, that the right of the International Brotherhood of Electrical Workers (IBEW) to collect compensation owed to its members under the public works lien laws is only remotely connected to ERISA. Employee Retirement Income Security Act of 1974, Pub. L.

No. 93-406, 88 Stat. 829 (codified as amended at 29 U.S.C. §§ 1001-1461) (ERISA). The claim in this case is not preempted.

Under 29 U.S.C. § 1144, all state laws are preempted to the extent they "relate to" any ERISA benefit plan. Prior to *Travelers,* the United States Supreme Court interpreted ERISA's preemption clause expansively. *See Shaw v. Delta Air Lines, Inc.,* 463 U.S. 85, 103 S.Ct. 2890, 77 L.Ed.2d 490 (1983). The pre-*Travelers* approach determined that a state law related to an employee benefit plan if it had a connection with or made reference to such a plan. *Shaw,* 463 U.S. at 97, 103 S.Ct. 2890. Relying upon an expansive and literal interpretation, the Court found that state laws having even remote effects on ERISA plans related to them and were preempted. *Shaw,* 463 U.S. at 97, 103 S.Ct. 2890; *see also In re Estate of Egelhoff,* 139 Wn.2d 557, 567 nn. 43-45, 989 P.2d 80 (1999) (citing cases decided under a broad interpretation), *cert. granted,* 120 S. Ct. 2687 (2000). Under the supremacy clause, we were required to apply the Court's analysis to determine preemption.

The United States Supreme Court has since retreated from and abandoned such an expansive reading of ERISA's text. Attempting to limit the seemingly endless reach the broad interpretation of "relates to" could yield, the *Travelers* Court determined that state laws with only a "'tenuous, remote, or peripheral' connection with covered plans" do not merit preemption. *Travelers,* 514 U.S. at 661 (quoting *District of Columbia v. Greater Wash. Bd. of Trade,* 506 U.S. 125, 130 n.1, 113 S.Ct. 580, 121 L.Ed.2d 513 (1992)). The Court noted that state courts should now look to the "objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive." *Travelers,* 514 U.S. at 656. Looking to these objectives and applying them in this case, the inescapable conclusion is that Congress never intended ERISA to serve as a shield for an employer to raise in order to prevent

its employees from collecting benefits owed them by that employer.

A primary concern of Congress when enacting ERISA was the "'mismanagement of funds accumulated to finance employee benefits and the failure to pay employees benefits from accumulated funds.'" *Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., Inc.*, 519 U.S. 316, 326-27, 117 S.Ct. 832, 136 L.Ed.2d 791 (1997) (quoting *Massachusetts v. Morash*, 490 U.S. 107, 115, 109 S.Ct. 1668, 104 L.Ed.2d 98 (1989)). To remedy this mismanagement, Congress enacted comprehensive regulations that permitted the nationally uniform administration of employee benefit plans. *Travelers*, 514 U.S. at 657. It was not, however, Congress' intention to create a law with such broad preemption powers so as to displace the traditional presumption against federal preemption of the state law. *Travelers*, 514 U.S. at 655. Under *Travelers*, when analyzing the connection between state law and ERISA regulations, courts must now apply the more common approach to preemption, starting with the presumption that Congress does not intend to supplant state law. *Travelers*, 514 U.S. at 654. This significantly narrows the scope of state law that is preempted.

Both the Ninth Circuit Court of Appeals and this court have recognized this new approach and have adopted the *Travelers* analysis. *Egelhoff*, 139 Wn.2d at 579, 989 P.2d 80 (ERISA does not preempt Washington's dissolution laws when determining life insurance and pension plan beneficiaries); *see Operating Eng'rs Health & Welfare Trust Fund v. JWJ Contracting Co.*, 135 F.3d 671 (9th Cir. 1998). In *Egelhoff*, we stated, "[t]he effect of *Travelers* and cases following justify retreat from the expansive preemption doctrine our court has previously followed to ensure ERISA's objective of protecting workers...." *Egelhoff*, 139 Wn.2d at 580, 989 P.2d 80. In the

present case, however, the majority minimizes the importance of *Egelhoff.*

> *Egelhoff* is distinguishable from this case because here our task, as in [*Puget Sound Electrical Workers*], involves delving into the relationship between Washington's public works lien statutes and ERISA, not the statute dealing with the distribution of nonprobate assets upon dissolution of marriage.

Majority at 626. The majority superficially contrasts *Egelhoff* with *Puget Sound Electrical Workers,* based solely on the types of laws at issue. By doing so, the majority concludes *Puget Sound Electrical Workers* is determinative and *Egelhoff* does not have any bearing on this case. *See* majority at 626. I disagree.

A significant difference between *Puget Sound Electrical Workers* and *Egelhoff* exists that goes beyond the types of laws at issue in each case. In each of those cases, a very different preemption analysis was applied, which led to the different results. In *Puget Sound Electrical Workers,* we applied a broad, expansive interpretation of ERISA's § 514(a), which we were required to do under *Shaw. Puget Sound Elec. Workers,* 123 Wn.2d at 568-69, 573, 870 P.2d 960; *see Shaw,* 463 U.S. at 95-98. In *Egelhoff,* we applied the narrower *Travelers* approach. By disregarding this shift in ERISA preemption, the majority avoids any meaningful application of the post-*Travelers* doctrine and reaches a conclusion inconsistent with current law.

The United States Supreme Court has cautioned against such an anachronistic approach. In reversing a decision of the Second Circuit Court of Appeals, the Court noted that the lower court "fail[ed] to give proper weight to *Travelers'* rejection of a strictly literal reading of § 514(a)." *De Buono v. NYSA-ILA Med. & Clinical Servs. Fund,* 520 U.S. 806, 812-13, 117 S. Ct. 1747, 138 L.Ed.2d 21 (1997) (state tax on gross receipts of

health care facilities was not preempted by ERISA). The majority makes the same mistake here.

The majority also discounts the Ninth Circuit's application of *Travelers*. *See JWJ Contracting Co.*, 135 F.3d 671. The majority cites to *JWJ Contracting* for the proposition that state laws providing remedies against third parties are preempted because those laws offer additional enforcement mechanisms. Majority at 627. That was the conclusion the Ninth Circuit reached in two pre-*Travelers* cases. *See Trs. of Elec. Workers Health & Welfare Trust v. Marjo Corp.*, 988 F.2d 865 (9th Cir. 1992); *Carpenters Health & Welfare Trust Fund v. Tri Capital Corp.*, 25 F.3d 849 (9th Cir. 1994). While those cases were correctly decided under *Shaw*, they are no longer good law.

The majority seriously misrepresents the Ninth Circuit's decision in *JWJ Contracting*. There, the defendants argued that the Ninth Circuit's pre-*Travelers* rulings were still good law and should be followed. While the Ninth Circuit agreed with the defendants' assertion that the statutes in *Marjo* and *Tri Capital* were preempted because the statutes in both provided remedies against third parties, it in no way affirmed the continuing control of those cases. *JWJ Contracting Co.*, 135 F.3d at 679. In fact, the court implied just the opposite, stating the *Marjo* and *Tri Capital* decisions relied on "expansive language from the Supreme Court demonstrating an understanding of ERISA pre-emption that has since been tailored to better fit Congress's policy intentions." *JWJ Contracting Co.*, 135 F.3d at 679.

The majority's misguided assessment of *JWJ Contracting* enables it once again to remain wholly unaccountable to the fundamental shift in preemption analysis. Avoiding this, the majority relies heavily upon a case decided under the pre-*Travelers* doctrine to determine the outcome in this case, thus leading it further astray.

The continuing viability of *Puget Sound Electrical Workers* serves as the linchpin of the majority's ruling. The majority cites this case for the proposition that the public works lien statutes at issue here provide an alternative funding mechanism and, therefore, are preempted under ERISA. Majority at 625. The majority concludes that *Puget Sound Electrical Workers'* continued authority is evidenced by the fact the *Travelers* Court reaffirmed its previous holding in *Ingersoll-Rand Co. v. McClendon,* 498 U.S. 133, 111 S.Ct. 478, 112 L.Ed.2d 474 (1990). In *Ingersoll-Rand,* the United States Supreme Court held that a Texas state law providing an alternative enforcement mechanism was preempted. *Ingersoll-Rand Co.,* 498 U.S. at 139-40. However, the Texas law involved a direct connection with ERISA rather than a remote one, as is the case here. Thus, the majority has misapplied *Travelers.*

At issue in *Ingersoll-Rand* was whether a common law cause of action in Texas for wrongful termination due to an employer's desire to avoid contributing to an employee's pension fund "related to" employee benefit plans. *Ingersoll-Rand Co.,* 498 U.S. at 137-39. The Supreme Court ruled that it did. The decision turned on the fact that the existence of an ERISA plan was a critical factor in establishing liability. *Ingersoll-Rand Co.,* 498 U.S at 139-40. The majority fails to recognize that the *Ingersoll-Rand* decision was premised on the fact that the law was "'specifically designed to affect employee benefit plans. . . .'" *Ingersoll-Rand Co.,* 498 U.S. at 140 (quoting *Mackey v. Lanier Collection Agency & Serv., Inc.,* 486 U.S. 825, 829, 108 S.Ct. 2182, 100 L.Ed.2d 836 (1988)). The connection was direct and substantial. However, that was not the case in *Puget Sound Electrical Workers,* and is not the case here.

The public works lien laws at issue in *Puget Sound Electrical Workers* and in this case are laws of general

applicability that are used by a class of creditors regardless of whether there is an ERISA plan. Thus, *Travelers'* reaffirmation of *Ingersoll-Rand's* holding has no bearing on whether *Puget Sound Electrical Workers* is good law.

Ingersoll-Rand expressly distinguished the Texas state cause of action from a "generally applicable statute that makes no reference to, or indeed functions irrespective of, the existence of an ERISA plan." *Ingersoll-Rand Co.*, 498 U.S. at 139. The Supreme Court pointed to its previous decision in *Mackey* (holding § 514(a) did not preempt a state's general garnishment procedures) to demonstrate that, even under its broadest reading, § 514 did not preempt a state's generally applicable statute that had only a tenuous connection with covered plans. *Ingersoll-Rand Co.*, 498 U.S. at 139-40. This is the exact situation we are presented with here. The public works lien laws are generally applicable statutes available to an entire class of creditors, regardless of whether an ERISA plan exists.

Other courts reviewing the use of lien laws to collect delinquent ERISA fund contributions from third parties have also drawn an analogy between the issues in those cases and the *Mackey* decision:

> "The United States Supreme Court has held that Congress did not intend to prohibit the use of state law garnishment procedures to execute judgments against ERISA benefit plans. *Mackey,* 486 U.S. at 831-32. If plans may use state law to collect on a judgment against a plan, certainly ERISA does not preempt the plan's ability to use those procedures to collect a judgment on behalf of the plan."

Haw. Laborers' Trust Funds v. Maui Prince Hotel, 81 Haw. 487, 497, 918 P.2d 1143 (1996) (quoting *Plumber's*

Local 458 Holiday Vacation Fund v. Howard Immel, Inc., 151 Wis.2d 233, 238-39, 445 N.W.2d 43 (Ct.App. 1989)).

Similarly, after thoroughly reviewing the congressional intent behind ERISA, the Hawaii Supreme Court held that disallowing the use of lien laws to collect delinquent ERISA fund contributions was inconsistent with ERISA's objective of protecting workers. *Haw. Laborers' Trust Funds,* 81 Haw. at 497-500. Ruling any other way, the Hawaii Supreme Court reasoned, would "ignore federal policy and fly in the face of logic." *Haw. Laborers' Trust Funds,* 81 Haw. at 500, 918 P.2d 1143. I agree.

In this case, the lien laws are laws of general applicability. They have only tenuous connections with ERISA plans. Under *Travelers,* such a connection is not enough to overcome the presumption that Congress does not intend to supplant state law. Therefore, this court's decision in *Puget Sound Electrical Workers* is no longer instructive and, to the extent it is no longer good law, is superseded by *Egelhoff* and *Travelers.*

The IBEW is attempting to collect funds owed to the employees. The public works lien statutes at issue here are generally applicable. They make no reference to an ERISA plan. The statute creates a procedural mechanism which is available to a class of creditors. Such laws often have only a "'tenuous, remote, or peripheral' connection with covered plans." *Travelers,* 514 U.S. at 661 (quoting *Greater Wash. Bd. of Trade,* 506 U.S. at 130 n.1). It is Trig's burden to prove Congress intended to supplant Washington's lien laws. *See De Buono,* 520 U.S. at 814 (party asserting ERISA preemption bears a considerable burden of proving that Congress intended to preempt state law). Reliance upon outdated precedence does not suffice to meet this burden.

Using "the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive," *Travelers*, 514 U.S. at 656, Congress did not intend to foreclose to employees established procedures for collecting benefits owed them. I would hold that the employees' right to collect the benefits owed them has no direct connection to ERISA and preemption does not apply.

SMITH, TALMADGE, and IRELAND, JJ., concur.

APPENDIX B
TO
PETITION FOR CERTIORARI

ORDER GRANTING SUMMARY JUDGMENT
King County Superior Court

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 46,
Plaintiff,

v.

TRIG ELECTRIC CONSTRUCTION CO., a Washington Corporation; LYDIG CONSTRUCTION, INC.; FIDELITY AND DEPOSIT COMPANY OF MARYLAND; and DEPARTMENT OF GENERAL ADMINISTRATION,
Defendants.

No. 98-2-26652-0 SEA

Entered August 6, 1999

THIS MATTER came before the Court on the motion of defendants Lydig Construction, Inc. and Fidelity and Deposit Company of Maryland to dismiss the complaint of the plaintiff with prejudice. In support of the motion, the moving defendants filed their motion, the declaration of William G. Gottschalk and the declaration of John Parnass. In opposition to the motion, the plaintiff filed Plaintiff's Memorandum in Opposition to Defendants' Motion for Summary Judgment, the Declaration of Michael H. Korpi, and the Affidavits of David B. Clements and Steve B. Hawke. By way of reply, the moving parties filed their Reply Brief in Support of Motion for Summary Judgment. Having reviewed the records and files herein and having heard oral argument of counsel, the Court hereby concludes that the motion should be granted and that, accordingly, it is hereby

ORDERED that the motion is hereby GRANTED and that the complaint of the plaintiff in this action is hereby DISMISSED WITH PREJUDICE.

DONE IN OPEN COURT this 6th day of August, 1999.

/s/_____
Honorable R. Joseph Wesley
Superior Court Judge

Presented by:

Davis Wright Tremaine LLP
Attorneys for Defendants Lydig Construction, Inc.
and Fidelity and Deposit Company of Maryland
By /s/_____
John Parnass, WSBA #18522

Copy received:
/s/_____
Michael H. Korpi, WSBA #12711
For plaintiff

(2)

Supreme Court, U.S.
FILED
MAR 9 2001
OFFICE OF THE CLERK

No. 00-1329

IN THE
Supreme Court of the United States

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 46,

Petitioner,

v.

TRIG ELECTRIC CONSTRUCTION CO.; LYDIG CONSTRUCTION, INC.; FIDELITY AND DEPOSIT COMPANY OF MARYLAND; AND DEPARTMENT OF GENERAL ADMINISTRATION, STATE OF WASHINGTON,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Washington

MOTION FOR LEAVE TO FILE *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF THE TRUSTEES OF THE SOUTHERN CALIFORNIA IBEW-NECA PENSION TRUST FUND, IN SUPPORT OF PETITIONER

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IN THE

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INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 46,

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TRIG ELECTRIC CONSTRUCTION CO.; LYDIG CONSTRUCTION, INC.; FIDELITY AND DEPOSIT COMPANY OF MARYLAND; AND DEPARTMENT OF GENERAL ADMINISTRATION, STATE OF WASHINGTON,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Washington

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Trustees of the Southern California IBEW-NECA Pension Trust Fund (California Trustees) move for leave to file the attached brief *Amici curiae* in support of granting the petition for certiorari in this case.

The consent of the attorney for the petitioner has been obtained. The consent of the attorneys for each of the respondents was requested. Attorneys for Respondents Trig Electric, Lydig Construction and Fidelity Deposit Company of Maryland consented in writing. Attorneys for the Washington Department of General Administration have not responded.

The California Trustees are trustees of a multi-employer employee benefit fund. They are also fiduciaries and agents for collection of several other multi-employer employee benefit funds in the construction industry. They are currently responsible for collecting several million dollars of delinquent contributions due to those funds. The California Trustees rely upon the California equivalent of the lien, bond and stop notice remedies at issue in this Petition to collect those contributions. Whether or not they can continue to do so will have a significant impact on their ability to collect these contributions, which pay for benefits for tens of thousands of participants.

The California Trustees have a case pending before the Ninth Circuit Court of Appeals which presents precisely the same issue as here, preemption of state law bond and stop notice remedies by the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1144, but as to the California equivalent of these laws: *Southern California IBEW-NECA Trust Funds, etc., et. al., v. Reliance Insurance Company, et. al.*, Ninth Circuit Docket No.s 99-55805, 99-55835 and 99-55954. That case has been argued and submitted, but no decision has been issued yet. They also have several cases pending in the trial courts involving the same issue.

The California Trustees wish to raise the following arguments which have not been adequately raised by the parties:

1) The Washington State laws at issue in this case are indistinguishable from similar laws in nearly all of the fifty states. The Circuit Courts and State Appellate Courts have come to conflicting decisions over whether these laws are preempted by ERISA, putting into doubt the ability to collect perhaps a Billion Dollars annually delinquent to multi-employer benefit plans in the construction industry.

2) Decisions, such as that of the Washington Supreme Court here, finding these centuries-old state remedies preempted by ERISA, should themselves be held preempted, as discriminating against ERISA plans and participants in the availability of creditors' remedies.

3) This would be an appropriate case for this Court to abandon the "relate to," "reference to," "connection with," and "alternative enforcement" formulas which have caused confusion in the lower courts, and instead return to the "field" and "conflict" preemption jurisprudence, as was historically applied under the Labor Management Relations Act, 29 U.S.C. § 185(a), and as Congress meant the courts to apply under ERISA.

Respectfully submitted,

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IN THE

Supreme Court of the United States

No. 00-1329

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 46,

Petitioner,

v.

TRIG ELECTRIC CONSTRUCTION CO.; LYDIG CONSTRUCTION, INC.; FIDELITY AND DEPOSIT COMPANY OF MARYLAND; AND DEPARTMENT OF GENERAL ADMINISTRATION, STATE OF WASHINGTON,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Washington

BRIEF *AMICI CURIAE* OF THE TRUSTEES OF THE SOUTHERN CALIFORNIA IBEW-NECA PENSION TRUST FUND, IN SUPPORT OF PETITIONER

INTEREST OF AMICI *

The Trustees of the Southern California IBEW-NECA Pension Trust Fund (California Trustees), *amici curiae*, urge that the Petition for a Writ of Certiorari to the Washington Supreme Court of International Brotherhood of Electrical Workers, Local Union No. 46 (Local 46) be granted.

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* Pursuant to Supreme Court Rule 37.6, *amici* state that none of the parties authored this brief in whole or in part and no one other than *amici* or undersigned counsel contributed money or services to the preparation or submission of this brief.

The California Trustees are trustees of a multi-employer employee benefit fund. They are also fiduciaries and agents for collection of several other multi-employer employee benefit funds in the construction industry.[1] They are currently responsible for collecting several million dollars of delinquent contributions due to those funds. In doing so, they rely on the California equivalent [2] of the Washington laws [3] which the Washington Supreme Court here declared preempted by the Employee Retirement Income Security Act (ERISA) § 514, 29 U.S.C. § 1144.

The same issue as here—whether these state law remedies are preempted by ERISA—is before the Ninth Circuit in a case in which the California Trustees and one of the parties here (Fidelity and Deposit Company of Maryland) are also party: *Southern California IBEW-NECA Trust Funds, etc., et. al., v. Reliance Insurance Company, et. al.*, Ninth Circuit Docket No.s 99-55805, 99-55835 and 99-55954. That case has been argued and submitted, but no decision has been issued yet. The California Trustees also have pending in the lower courts numerous other cases raising the same issue. The decision of this Court will clearly affect the outcome of these pending cases, and the ability of the California Trustees to effectively collect delinquent contributions paying for benefits for tens of thousands of participants.

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[1] These include the Southern California IBEW-NECA Health Trust Fund; IBEW Local 11 NECA Joint Apprenticeship and Educational Training Trust Fund; Riverside County Electrical Health and Welfare Trust Fund; Local Union 440-NECA Joint Apprenticeship and Educational Training Trust Fund; Orange County Electrical Industry Health and Welfare Trust Fund; Local Union 441-NECA Joint Apprenticeship and Education Training Trust Fund; Local Union 441 Credit Union; Local Union 477-NECA Joint Apprenticeship and Educational Training Trust Fund; National Electric Benefit Fund; and the National Electrical Industry Fund.

[2] Calif. Const. Art. XIV, § 3; Calif. Civ. Code §§ 3082-3267.

[3] Rev. Code Wash. §§ 39.08.010 and 60.28.010.

REASONS THE WRIT SHOULD BE GRANTED

I. THE STATE LAW REMEDIES FOUND PRE-EMPTED BY THE WASHINGTON SUPREME COURT ARE LEGALLY INDISTINGUISHABLE FROM REMEDIES IN NEARLY EVERY OTHER STATE, WHICH IMPACT PERHAPS A BILLION DOLLARS ANNUALLY IN DELINQUENT CONTRIBUTIONS FOR FRINGE BENEFITS IN THE CONSTRUCTION INDUSTRY

In the case below, a 5-4 majority of the Washington Supreme Court held that the Washington payment bond [4] and stop notice [5] remedies did not protect fringe benefit contributions along with other labor costs, because those laws are preempted by ERISA § 514, 29 U.S.C. § 1144. *International Brotherhood of Electrical Workers, Local Union No. 46 v. Trig Electric Construction Co.*, 142 Wash.2d 431, 13 P.3d 622 (2000) (hereafter "Trig"). In doing so, the *Trig* majority attempted to distinguish two Circuit Court of Appeal decisions [6] and one State Supreme Court decision [7] which came to the opposite conclusion. The majority also ignored at least four other Circuit Court of Appeal decisions contrary to its holding.[8]

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[4] Revised Code of Washington (RCW) § 39.08.010, *reprinted in* Petition at 2-3.

[5] RCW § 60.28.010, *reprinted in* Petition at 3-4.

[6] *Operating Engineers Health and Welfare Trust Fund v. JWJ Contracting Co.*, 135 F.3d 671, 676-79 (9th Cir. 1998) (AZ Payment Bond not preempted); *Greenblatt v. Delta Plumbing Corp.*, 68 F.3d 561 (2d Cir. 1995) (NY surety bond not preempted).

[7] *Board of Trustees of Operating Engineers Local 825 Fund v. L.B.S. Construction Co.*, 148 N.J. 561, 691 A.2d 339, *cert. denied*, 522 U.S. 861 (1997) (NJ payment bond not preempted).

[8] *Carpenters Local Union No. 26 v. United States Fidelity & Guar. Co.*, 215 F.3d 136 (1st Cir. 2000) (Mass. payment bond not preempted),

The effort to distinguish these contrary cases and other laws is without merit, however. The laws at issue here are just an example of similar laws of general application in virtually all fifty states, which all have the same purpose (guaranteeing payment of labor and materials on construction projects) and origins (in the mechanic lien statutes). There is no difference between the operation of these laws which would have any bearing on whether they should be preempted by ERISA.

All of these laws trace their origins to state mechanic lien laws, the first of which were enacted over two centuries ago.[9] This remedy allows workers who have not been paid for their labor to recover payment from the property they labored on, by way of a lien. Black's Law Dictionary 4th Ed., at 1132 (West 1957). These laws reflect a solicitude for the full and prompt payment of workers, which has historically been a matter of state concern. *See Livados v. Bradshaw*, 512 U.S. 107, 123-25, 114 S. Ct. 2068, 129 L. Ed. 2d 93 (1994) (CA statute requiring prompt payment of wages on termination was among non-negotiable rights traditionally conferred on employees by state law).

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overruling Williams v. Ashland Engineering Co., 45 F.3d 588 (1st Cir.), *cert. denied*, 516 U.S. 1011 (1995); *Trustees for Michigan Laborers Health Care Fund v. Seaboard Surety Co.*, 137 F.3d 427 (6th Cir. 1998) (MI payment bond not preempted); *Bleiler v. Cristwood Constr., Inc.*, 75 F.3d 13 (2d Cir. 1995) (Conn. Payment Bond not preempted); *Ragan v. Tri-County*, 62 F.3d 501 (3d Cir. 1995) (PA payment bond not preempted).

[9] Maryland passed a mechanic lien law in 1791. 2 Kilty's Laws of Md., Act 1791, ch. 45, § 10. Congress passed one for the District of Columbia in 1833. 4 Stat. 659 (March 2, 1833). *See Winder v. Caldwell*, 55 U.S. 434, 14 L.Ed. 487 (1852). For a description of the agitation by early workers' associations for such laws, *see* Philip S. Foner, *History of the Labor Movement in the United States, Vol. 1: From Colonial Times to the Founding of the American Federation of Labor*, at 124 (Int'l Pub. 1947).

In the Western States, mechanic lien laws are as old as the states themselves. California passed a mechanic lien law in its first legislative session in 1850. 1850 Cal. Stat. 211-13, ch. 87 §§ 1-4; *see generally* Sackman, *Lien On: The Story of the Elimination and Return of Mechanic Lien, Stop Notice and Bond Remedies for Collection of Contributions to Employee Benefit Funds*, 20 Berk. J. Emp. & Lab. L. 254-85 (1999).[10] Washington passed its first mechanic lien law while it was still a territory, Code Wash. T. § 1957 (1881), and codified it upon achieving statehood. *See Spokane Mfg. & Lumber Co. v. McChesney*, 1 Wash. 609, 21 P. 198 (1889) (upholding constitutionality of Washington mechanic lien law).

Because a lien could not be placed upon public property, the remedies of stop notices and payment bonds were developed to provide laborers the same protections on public works. *See Hall & Olswang v. Aetna Casualty & Surety Co.*, 161 Wash. 38, 47, 296 P. 162 (1931); *Clark v. Beyrle*, 160 Cal. 306, 311, 116 P. 739 (1911); *see generally Lien On*, at 257-59. The Washington payment bond statute at issue here was passed in its first legislature, Wash. Stat. 1888 p. 15 § 1, and the stop notice law dates back to at least 1921, Wash. Stat. 1921 ch. 166 § 1.

What is here referred to as a "stop notice" law, is a requirement that the project owner (whether private or public) withhold, after notice, a portion of the contract price to guarantee any unpaid labor or material claims on the job. RCW § 60.28.010; *see also* Calif. Civ. Code § 3181. What is here referred to as a "payment bond" law is one which requires a bond or surety to be posted (usually by the general contractor) to similarly guarantee payment of all labor and materials on the job. RCW § 39.08.010; *see also* Calif. Civ. Code § 3247. While these remedies may be referred to by

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[10] Hereafter "Lien On."

different names, we use this terminology here for consistency, and to demonstrate the similarity of these remedies.[11] Regardless of the terminology or the procedural requirements of these statutes, they all serve the same purpose: to provide a third-party guarantee for the payment of labor and materials on construction jobs, whether by the property itself, the funds allocated for construction, or a mandatory bond.

In 1957, this Court was faced with the question of whether the protection of labor on federal projects included contributions to fringe benefit funds under the Miller Act.[12] This Court held that it did. *U.S. ex. rel. Sherman v. Carter*, 353 U.S. 210, 77 S.Ct. 793, 1 L.Ed.2d 776 (1957). That decision was based on the observation that the trustees of these funds stood as assignees in the shoes of the laborers who allocated part of their pay for these benefits, and thus should be able to enforce the bond rights as would any other assignee. *Id.* at 218-19.

Like the federal courts, the courts of Washington have long held that labor claims under their bond and lien laws may be asserted by an assignee. *See Maryland Casualty Co. v. Philbrick & Nicholson*, 147 Wash. 277, 266 P. 142 (1928).

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[11] For example, stop notice laws are often referred to as "lien" laws, because they essentially place a "lien" on the funds (rather than the property) allocated for the project. *See, e.g. Plumbing Industry Board v. E.W. Howell Co.*, 126 F.3d 61 (2d Cir. 1997) (holding NY "Lien" Law, for withholding unpaid labor on public works, preempted by ERISA); *but see Alibrandi Building Systems, Inc. v. Wm. C. Pahl Construction Co.*, 187 A.D.2d 957, 590 N.Y.S.2d 370 (1992) (holding another provision of the same NY "Lien" Law *not* preempted).

[12] 40 U.S.C. § 270a. As with the state laws, the purpose of the federal law "was to provide security for the payment of all persons who provide labor or material on public work . . . by giving a claim under the bond in lieu of the lien upon land and buildings customary where property is owned by private persons." *Illinois Surety Co. v. John Davis Co.*, 244 U.S. 376, 380, 37 S.Ct. 614, 61 L.Ed. 1206 (1917).

Thus, like many other states,[13] Washington applied this Court's decision in *Carter* to its own laws, and held that wages assigned to fringe benefit funds were protected by state bond and lien laws. *Crabtree v. Lewis*, 86 Wash.2d 282, 544 P.2d 10 (1975).

Some states then codified these decisions into their statutes, including trust funds among those who may assert these remedies.[14] Others, like Washington and Arizona, left this a matter of court interpretation of the statute.[15] While some courts have seized upon this distinction as relevant to preemption, the definition of "state law" in ERISA § 514(c)(1), 29 U.S.C. § 1144(c)(1) makes clear that state decisional and legislative law are treated equally for preemption purposes. *See Jones v. Roth Packing Co.*, 430 U.S. 519, 526, 97 S.Ct. 1305, 51 L.Ed.2d 604 (1977) (preemption turns on "the relationship between state and federal laws as they are interpreted and applied, not merely as they are written.")

The importance of these remedies to employee benefit funds cannot be understated. The U.S. Census Bureau reports over Fifteen Billion Dollars paid annually for voluntary fringe benefits in the construction industry. U.S. Census Bureau, *1997 Economic Census, Construction—Geographic Area Summary*, Table 3 at 9 (April 2000). Applying the ratio of

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[13] *See, e.g., Arizona Laborers, Teamsters and Cement Masons Local 395 Health and Welfare Trust Fund v. New Pueblo Constructors, Inc.*, 131 Ariz. 278, 279, 640 P.2d 209, 210 (1982); *Trustees of Florida West v. Quality Concrete*, 385 So.2d 1163, 1165 (Fla. App. 1980); *Tobler v. Oliver Constr. Co.*, 442 P.2d 904, 907 (Nev. 1968); *Bernard v. Indemnity Ins. Co.*, 162 Cal.App.2d 479, 487, 329 P.2d 57 (1958).

[14] *See, e.g.*, Calif. Civ. Code § 3111.

[15] While Washington did not amend the bond and stop notice statutes at issue here to refer to fringe benefits, the definition of "labor" for purposes of mechanic liens has been amended to include fringe benefit contributions. RCW §§ 60.04.011(4) and (7).

delinquent over paid contributions (8.19%) of one of his larger clients to this data, this author estimated the loss of delinquent contributions nationally to be over a Billion Dollars. *Lien On*, at 282 n. 185.

The laws at issue here are essentially creditors' remedies.[16] The issue presented by this petition is whether ERISA benefit contributions are to be excluded from these remedies, as found by the court below. This Court has noted "the uniquely temporary, transitory, and sometimes seasonal nature of much of the employment in the construction industry." *Jim McNeff, Inc. v. Todd*, 461 U.S. 260, 266, 103 S.Ct. 1753, 75 L.Ed.2d 830 (1983). Employers can be as transitory as employment in this industry, often leaving behind unpaid workers. This was the original impetus for these state laws two centuries ago. They are just as important today. "In the construction industry, employees receive more of their compensation in the form of retirement and savings benefits than in any other industry." U.S. Dept. of Labor, *The Editor's Desk: Importance of Retirement Benefits in Compensation*, Monthly Labor Review (8/2/1999). The exclusion of fringe benefits from these creditor remedies has had a devastating effect on the ability to actually collect contributions, and we would argue that this discrimination in creditor remedies should *itself* be held preempted. *See Lien On*, at 283-85.

II. THE CIRCUIT COURTS AND HIGH COURTS OF VARIOUS STATES HAVE SPLIT OVER WHETHER THESE STATE LAW REMEDIES ARE PREEMPTED BY ERISA.

On this vital issue of whether fringe benefits are to be protected on the same basis as other compensation, or

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[16] *See Connolly Development, Inc. v. Superior Court*, 17 Cal.3d 803, 808, 132 Cal.Rptr. 477, 55 P.2d 637 (1976) (noting that in California, mechanic liens are the only "creditors' remedy" accorded Constitutional status).

whether ERISA funds are to be treated as second-class creditors, the courts have split every which way. The Circuit Courts of Appeals have disagreed with each other.[17] The highest courts of the states have disagreed with each other on this federal question.[18] The highest courts of the states have disagreed with Circuit Courts of Appeal.[19] The same court has even come to contrary conclusions over this same issue.[20]

As to each of these remedies, appellate courts are divided. There are conflicting decisions holding mechanic liens preempted[21] and not preempted,[22] holding stop notices

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[17] *Compare, e.g., Carpenters Local Union No. 26, supra* (1st Cir.: Mass. payment bond *not* preempted), *with Plumbing Industry Board, supra* (2d Cir.: NY Stop Notice preempted).

[18] *Compare, e.g., Hawaii Laborers Trust Funds v. Maui Prince Hotel.*, 81 Hawaii 487, 918 P.2d 1143 (1996), *cert. denied*, 521 U.S. 1119 (1997) (HI mechanic lien *not* preempted), *with Carpenters Southern California Administrative Corp. v. El Capitan Development Co.*, 53 Cal.3d 1041, 282 Cal.Rptr. 277, 811 P.2d 296, *cert. denied*, 502 U.S. 963 (1991) (CA mechanic lien preempted).

[19] *Compare, e.g., Trig, supra* (Wash. payment bond preempted), *with Carpenters Local Union No. 26, supra* (1st Cir.: Mass. payment bond *not* preempted).

[20] *Compare, e.g., JWJ Contracting Co., supra* (9th Cir.: AZ Payment Bond *not* preempted), *with Carpenters Health & Welfare Trust for California v. Tri-Capital Corp.*, 25 F.3d 849, 853-54 (9th Cir.), *cert. denied*, 513 U.S. 1018 (1994) (CA Stop Notice preempted).

[21] *McCoy v. Massachusetts Institute of Technology*, 950 F.2d 13 (1st Cir. 1991), *cert. denied*, 504 U.S. 910 (1992) (MA mechanic lien); *Iron Workers Mid-South Pension Fund v. Terotechnology Corp.*, 891 F.2d 548 (5th Cir.), *cert. denied*, 497 U.S. 1024 (1990) (LA mechanic lien); *Faeth v. ACA Environmental Sevkos, Inc.*, 172 Misc.2d 453, 659 N.Y.S.2d 683 (1997) (NY mechanic lien); *Sturgis v. Herman Miller, Inc.*, 943 F.2d 1127, 1129 (9th Cir. 1991) (CA mechanic lien); *El Capitan Development Co., supra* (CA mechanic lien); *Edwards v. Bethlehem Steel Corp.*, 554 N.E.2d 833 (Ind. Ct. App. 1990) (Ind. Mechanic Lien).

[22] *IBEW Local No. 48 v. Oregon Steel Mills, Inc.*, 168 Ore. App. 101, 5 P.3d 1122 (2000) (OR Mechanic Lien); *Bellemead Development v. New*

preempted,[23] and not preempted,[24] and holding payment bonds preempted,[25] and not preempted.[26] While the general trend of these cases has been *away* from preemption, the divided opinion in this case shows that the trend is not uniform. The courts remain deeply divided over the issue.

The issue in all of these cases should be the same: whether a creditor remedy to guarantee all labor costs is preempted by ERISA if it includes fringe benefits in the value of labor protected. Only this Court can resolve the split over this issue.

Jersey Council of Carpenters Benefit Funds, 11 F.Supp.2d 500 (D.N.J. 1998) (NJ mechanic lien); *Hawaii Laborers Trust Funds, supra* (HI mechanic lien); *Plumbers Local 458 Holiday Vacation Fund v. Immel*, 151 Wis.2d 233, 445 N.W.2d 43 (Wis. App. 1989) (Wis. mechanic lien).

[23] *Trig, supra* (Wash. stop notice); *Plumbing Industry Board, supra* (NY Stop Notice); *Tri-Capital Corp., supra* (CA Stop Notice); *Bricklayers & Allied Craftsmen Local 33 Benefit Funds v. America's Marble Source*, 950 F.2d 114 (3rd Cir. 1991) (NJ Stop Notice).

[24] *In Re Coyne Electrical Contractors, Inc.*, 244 B.R. 245 (B.C. S.D.N.Y. 2000) (NY "Lien Law" on trust assets held by contractor); *Alibrandi Building Systems, Inc. v. Wm. C. Pahl Construction Co.*, 187 A.D.2d 957, 590 N.Y.S.2d 370 (1992) (NY stop notice).

[25] *Trig Electric, supra* (Wash. payment bond); *Williams v. Ashland Engineering Co.*, 45 F.3d 588 (1st Cir.), *cert. denied*, 516 U.S. 1011 (1995) (Mass. payment bond); *Operating Engineers Pension Trust v. Insurance Company of the West*, 35 Cal.App.4th 59, 66-67, 42 Cal.Rptr.2d 1, *cert. denied*, 516 U.S. 1011 (1995) (CA Payment Bond).

[26] *Carpenters Local Union No. 26, supra* (Mass. payment bond); *Trustees for Michigan Laborers Health Care Fund v. Seaboard Surety Co.*, 137 F.3d 427 (6th Cir. 1998) (MI payment bond); *JWJ Contracting Co., supra* (AZ Payment Bond); *Bleiler v. Cristwood Constr. , Inc.*, 75 F.3d 13 (2d Cir. 1995) (Conn. Payment Bond); *Greenblatt v. Delta Plumbing Corp.*, 68 F.3d 561 (2d Cir. 1995) (NY surety bond); *Ragan v. Tri-County*, 62 F.3d 501 (3d Cir. 1995) (PA payment bond); *L.B.S. Construction Co., supra* (NJ payment bond); *Seaboard Surety Co. v. Indiana State District Council of Laborers and Hod Carriers Health and Welfare Fund*, 645 N.E.2d 1121 (Ind. 1995) (Ind. Payment Bond); *Alibrandi, supra* (NY Payment Bond).

III. THE CONFUSION AMONG THE CIRCUITS AND STATE COURTS CAN ONLY BE RESOLVED IF THIS COURT CLARIFIES ITS ERISA PREEMPTION ANALYSIS

The confusion among the Circuit and State courts is the result of their formulistic application of language from this Court's decisions, which can only be corrected by a clarification of that language by this Court. We do not urge overturning or even questioning any of those decisions, but rather that this court announce a return to the traditional analysis of "field" and "conflict" preemption, which is what we believe Congress intended.

Preemption derives from the "Supremacy Clause" of the Constitution. U.S. Const., Article VI, cl. 2. But the power of Congress to preempt state law can be no greater than its power to legislate in the first place. "Within the scope of its powers, as enumerated and defined, it [federal law] is supreme and above the States, but beyond, it has no existence." *U.S. v. Cruikshank*, 92 U.S. 542, 550, 23 L.Ed. 588, 590 (1876).

Originally, this Court described ERISA preemption in broad terms, as reaching any state law which "relate[s] to" ERISA plans "in the normal sense of the phrase." *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 97, 103 S.Ct. 2890, 77 L.Ed.2d 490 (1983). Taken to its logical limit, this construction would call for preemption of state law beyond the Constitutional power of Congress, "since, as many a curbstone philosopher has observed, everything is related to everything else." *California Division of Labor Standards Enforcement v. Dillingham Construction, Inc.*, 519 U.S. 316, 335, 117 S.Ct. 832, 136 L.Ed. 2d 791 (1997) (Scalia, J., concurring).

While this Court has abandoned the metaphysical "relate to" approach, the alternative formulation of "reference to" or

"connection with" has been no more helpful. "For the same reasons that infinite relations cannot be the measure of pre-emption, neither can infinite connections." *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*, 514 U.S. 645, 656, 115 S.Ct. 1671, 131 L.Ed. 2d 695 (1995).

In particular, the formulistic application of the "alternative enforcement mechanism" language (or "alternative funding mechanism" as the Washington Supreme Court put it) [27] has been responsible for the incorrectly-decided cases cited above. That language comes from this Court's decision in *Pilot Life Insurance v. Dedeaux* 481 U.S. 41, 107 S.Ct. 1549, 95 L.Ed. 2d. 39 (1987). The Court there held that the *benefit* enforcement provisions of ERISA were meant by Congress to be exclusive, in the same manner that the balance of weapons and defenses in labor relations was meant to be exclusive under the Labor Management Relations Act (LMRA) § 301(a), 29 U.S.C. § 185(a). 481 U.S. at 55-56. Indeed, Congress specifically referred to the broad sweep of preemption under the LMRA in discussing these benefit enforcement provisions in the original enactment of ERISA. H.R. Conf. Rep. No. 93-1280, p. 327 (1974). Thus, the *Pilot Life* line of cases can be explained as applying the familiar "field" preemption developed under the LMRA, *see, e.g. Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 105 S.Ct. 1904, 85 L.Ed.2d 206 (1985), to benefit enforcement actions under ERISA.

Yet the thoughtless recitation of the "alternate enforcement mechanism" formula, as here, without looking at its origins and reasons, has created absurd results. The Washington Supreme Court, and other courts following the same

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[27] *Trig*, 13 P.3d 622, 627. Taken to its logical extreme, any legal action by an ERISA fund to collect a debt, such as rent on property it owned, could be called an "alternative funding mechanism" and thus preempted.

formula,[28] have ignored the fact that there was no enforcement mechanism for delinquent contributions in the original enactment of ERISA. Pub. L. 93-406, 88 Stat. 832 (1974).[29] That is not to say that Congress had not occupied the field. For over two decades before the enactment of ERISA, actions to collect delinquent contributions were brought under the LMRA, 29 U.S.C. § 185(a), as actions to enforce a collective bargaining agreement. *See, e.g. Lewis v. Benedict Coal Corp.*, 361 U.S. 459, 465-71, 80 S.Ct. 489, 4 L.Ed.2d 442 (1960). Yet in those two decades under the LMRA, whose broad sweep of preemption was the model for ERISA, there is no published decision holding these remedies to be preempted.

It was not until the Multi-Employer Pension Plan Amendments Act (MEPPA) of 1980 [30] that an "enforcement mechanism" for delinquent contributions was added to ERISA. By creating an explicit ERISA cause of action for delinquent contributions, did Congress mean that state remedies would now be preempted by ERISA, when they had not been preempted under the LMRA? The intent of Congress in this regard was clearly stated: "The Committee Amendment does not change any other type of remedy [other than attorney fees and liquidated damages] permitted under state or federal law with respect to delinquent contributions." H.R. Rep. No. 96-869, part 2, at 49, *reprinted in* 1980 U.S.C.C.A.N. 2993, 3038.

The "alternative enforcement mechanism" holding of *Pilot Life* was solidly grounded in an analysis of Congressional intent. 481 U.S. 41, 54-56. Yet the lower courts have simply peeled off this label and thoughtlessly applied it, without

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[28] *See, e.g., El Capitan, supra,* 53 Cal.3d 1041, 1052-53.

[29] *See Lien On,* 20 Berk. J. Emp. & Lab. L. 245, 262-66.

[30] Pub. L. No. 96-364, 94 Stat. 1209. Specifically, these amendments added what is now 29 U.S.C. §§ 1132(g)(2) and 1145.

looking at the Congressional intent as this Court originally did. For this reason, we believe that the Court needs to clarify its preemption analysis, and direct the lower courts away from applying simple labels and formulas. Instead, we urge that the Court adopt the suggestion in the *Dillingham* concurrence to "apply ordinary field pre-emption, and, of course, ordinary conflict pre-emption." *Dillingham*, 519 U.S. 316, 336 (Scalia, J., concurring). This should direct the lower courts back to an analysis of the intent of Congress and the actual effect of the state laws in question on the intended purpose of ERISA.

CONCLUSION

This split decision by the Washington Supreme Court adds to the existing confusion and conflict among Circuit and State courts over whether state guarantees of labor on construction jobs are preempted when they include fringe benefits governed by ERISA. This confusion casts doubt on the ability to collect up to a Billion dollars annually in delinquent contributions, jeopardizing the benefits of millions of construction workers and their families. Now is the time to take the issue up and resolve this split over a vital question of remedies to guarantee that workers will see the benefits promised them for their labor.

This is also the opportunity to cast aside the labels and formulas which have taken preemption analysis away from the cornerstone of Congressional intent and brought it perilously close to a usurpation of power which Congress never intended. All things on this Earth must have their measure and their limit, even ERISA preemption. The Petition should be granted.

Respectfully submitted,

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Supreme Court, U.S.
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No. 00-1329

In The

Supreme Court of the United States

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 46,

Petitioner,

v.

TRIG ELECTRIC CONSTRUCTION CO., A WASHINGTON CORPORATION; LYDIG CONSTRUCTION, INC.; FIDELITY AND DEPOSIT COMPANY OF MARYLAND; and DEPARTMENT OF GENERAL ADMINISTRATION,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Washington

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, there is no parent corporation of Respondent Lydig Construction, Inc. and no publicly held corporation owning any of its stock. Respondent Fidelity & Deposit Company of Maryland is wholly owned by Zurich North America Insurance, Inc.

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REASONS FOR DENYING THE WRIT

Petitioner asserts the opinion of the Washington Supreme Court is part of a "nationwide proliferation of litigation over the question presented" and this Court's attention is warranted to resolve an alleged conflict in authority. Pet. at 13. Petitioner also contends this Court must step in to rectify alleged "disparate treatment" resulting from the application of ERISA as enacted by Congress. Pet. at 14. On at least three grounds, the petition should be denied.

First, Petitioner ignores a fundamental jurisdictional bar to review on the merits – its own lack of standing. While the Washington Supreme Court elected to bypass this critical threshold issue in its decision on the merits, the "case" or "controversy" requirement of Article III to the Constitution cannot be satisfied in this case. The standing impediment alone bars review.

Second, the alleged conflict within the "nationwide proliferation" of litigation alluded to by Petitioner is a fiction built on clearly distinguishable cases. Looking at analogous cases leads to the conclusion that the case law is stable and consistent. The courts before and after *New York State Conference of Blue Cross and Blue Shield Plans v. Travelers Ins. Co.*, 510 U.S. 645 (1995) have soundly and consistently held that when state bond statutes augment the exclusive remedies created by Congress and thereby create a wholly new class of obligors required to pay enhanced federal pension liabilities, they are preempted. There is simply no "compelling" need for this Court to step in at this time. Supreme Court Rule 10.

Third, Petitioner's naked invitation to have this Court exercise legislative judgment to rectify a perceived "disparate" treatment caused by the remedial scheme enacted by Congress under ERISA simply proves that Petitioner's complaint is more appropriately directed to Congress.

I.

PETITIONER LACKS STANDING

Petitioner in this case is not the electrical subcontractor hired by general contractor Respondent Lydig Construction, not any of the employees who worked for that subcontractor, and not the trust fund that allegedly failed to receive fringe benefit payments from the subcontractor under the terms of the collective bargaining agreement alleged in the complaint.

Petitioner is instead the collective bargaining representative of the employees, which alleges in its complaint that the electrical subcontractor did not pay fringe benefit contributions *to the trust funds*. There is no evidence the trust funds authorized this plaintiff to sue on their behalf or that Petitioner sustained any injury in fact because of the alleged underpayments. Nor is there any evidence that employees suffered any harm since it is admitted that the trust funds would have had to make up any alleged shortfall in delinquent contributions. Pet. at 12, n. 4.

Petitioner filed a lien notice on March 24, 1998 for approximately $45,000 and an amended lien notice on July 22, 1998 in a slightly revised amount, both of which were made in the name of "the undersigned Local 46

IBEW (Union)." App. at 1, 6. Not once has Petitioner alleged or proven it is acting on behalf of any trust fund. Petitioner brought this action in its name, purporting to have standing under the public works statutes of the State of Washington to foreclose liens against the surety bond.[1]

Respondents moved for summary judgment on July 9, 1999, arguing first and foremost that Petitioner lacked standing to sue as an association under the holding of *Ironworkers District Council of the Pacific Northwest v. Board of Regents*, 93 Wn. App. 735, 970 P.2d 351 (1999) ("*Ironworkers*") (labor organization does not provide labor to the project, and is therefore not a legally recognized claimant under the bond lien statute). The trial court assigned to this matter, The Honorable R. Joseph Wesley of the King County Superior Court, had coincidentally ruled in favor of another general contractor on this same standing issue in a similar case only three months before Respondents brought their motion in this case.[2] App. at 3-5.

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[1] As required by RCW 39.08, Respondent Lydig Construction acquired a payment bond from Respondent Fidelity and Deposit Company of Maryland as surety. A surety bond is not insurance, since the principal (Lydig) is required to reimburse the surety for any claims or losses incurred. *Honey v. Davis*, 131 Wn. 2d 212, 930 P.2d 908 (1997).

[2] That prior case was referred to below as the *Sollitt* case, for the general contractor involved in *Ironworkers District Council of the Pacific Northwest v. University of Washington, et al.*, King County Cause No. 98-2-03821-7 SEA. The general contractor in *Sollitt* had brought its motion based on *Ironworkers* and the trial court agreed that plaintiff's complaint in *Sollitt* would have to be dismissed under the authority of that case. At the hearing on the defense motion in *Sollitt*, the plaintiff union

In the alternative, Respondents moved to dismiss the action on the basis of ERISA preemption. Respondents noted that while the nominal plaintiff in this action was a labor organization, the real party in interest appeared to be the trust fund to whom petitioner would presumably channel any monetary recovery achieved in this litigation. On that ground, Respondents contended that merely packaging a trust fund claim under the guise of a claim by Petitioner labor council as named plaintiff changes nothing in the substance of the claim and that to allow Petitioner to prosecute a claim that is otherwise preempted by ERISA merely because the suit is not brought in the name of the ERISA trust fund would exalt form over substance.

In opposition to Respondents' motion, Petitioner attempted to establish its standing to sue by citing to various "assignments" of claims executed *not* by the trust funds in favor of Petitioner but instead by certain employees of the defaulting subcontractor, Trig Electric Construction Company. Petitioner had not previously invoked any assignments to establish standing to sue in this case. The lien notices and the complaint are devoid of any mention of assignments. The efficacy of such assignments, where the employees received benefit credits regardless of the employer's payment or not, was doubtful at best. Also problematic was the fact, pointed out by

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council moved orally to amend its complaint to allege its standing as an "assignee" of certain individual members who worked on the project. The trial court rejected this argument on various grounds including the fact that "at the time the lien was filed, the party claiming the lien, the council, had no assignments." App. at 4.

Respondents to the King County Superior Court, that all of the purported assignments of claims were executed by employees long *after* Petitioner filed its first and amended lien notices in March and July of 1998, respectively. Since assignments can only be effective when made, and Petitioner had no assignments in hand when either of the lien notices were recorded, the original or amended liens were void and Petitioner had no standing to sue to foreclose them just as in the *Sollitt* case (*see* fn.2).

In response to this argument, Petitioner advanced a novel "relation back" theory, contending the assignments (executed in November and December of 1998 and July of 1999) "related back" to the first and amended lien notices in March and July of 1998 and therefore cured the obvious lack of authority to lien and standing to sue that would otherwise exist under the *Ironworkers* case. Respondents in turn argued that Petitioner's "relation back" doctrine was without precedent under Washington law (to this day, Petitioner has still not offered any such precedent) and was bad policy since the predictability and certainty required of the public lien notice system would be eviscerated if, without notice to potentially liable parties, a defective lien notice could be unilaterally amended by the undisclosed activity of another (*i.e.*, securing assignments from the alleged parties in interest). Respondents contended that Washington's lien statutes look to the notice itself as the exclusive determinant of the claimant's rights to payment since the lien notice, as a publicly filed document (RCW 39.08.030) must be relied upon by the world at large.

The King County Superior Court entered an order dismissing the action on August 6, 1999. Pet. at 23a. On

direct review by the Washington Supreme Court, all parties vigorously briefed the standing issue. In affirming the judgment, the Washington Supreme Court declined to decide the standing issue. Pet. at 4a, n.1 ("The standing issue is not essential to our holding. We therefore pass to the ERISA preemption question.") Petitioner now asks this Court to take review without so much as mentioning this fundamental jurisdictional bar or its extensive history in the proceedings below.

To satisfy the "case" or "controversy" under Article III of the Constitution, Petitioner must establish the "irreducible constitutional minimum" of standing. *Bennett v. Spear*, 520 U.S. 154, 162 (1997); *Diamond v. Charles*, 476 U.S. 54, 61-62 (1986) (dismissing appeal for want of subject matter jurisdiction). While Article III standing is a question of federal law,[3] the holding in *Ironworkers* correctly turned on well-established federal law doctrines on the standing of an association to sue on behalf of its members. *Ironworkers*, 93 Wn. App. at 741, n.14, 970 P.2d at 354, n.14 (citing *Warth v. Seldin*, 422 U.S. 490 (1975). The particular standing issue here is imbued with novel and untested issues concerning the requirements under Washington state law for perfecting a valid claim under Washington's lien statute.[4]

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[3] *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 804 (1985).

[4] While in *dicta Ironworkers* suggested that assignments could provide standing in an appropriate case, the King County Superior Court found the assignments in this case failed because they do not "relate back" to cure the obvious infirmity in the public lien notice. As noted above, they also were not executed by the trusts as the real parties in interest.

Petitioner's lack of standing obviates the petition. The assignments were not provided by the allegedly injured party (the trust). As Petitioner concedes, the employees suffered no harm because the trusts were required to provide benefit credits regardless of payment by the subcontractor employer. Pet. at 12, n.4. Second, even if assignments from employees were to be considered, they have no effect under the particular circumstances of this case because Petitioner's "relation back" twist on standing is without precedent and is contrary to the whole public scheme of Washington's lien statute. At a minimum, it would be anomalous for the Supreme Court to reach out and take review of this case where the Washington Supreme Court expressly declined to address, much less endorse, Petitioner's ambitious standing theory under state lien law. This matter is not an appropriate case or controversy for resolution of the issue presented.

II.

THERE IS NO "NATIONWIDE PROLIFERATION" OF CASES

Petitioner tactically dramatizes the split of opinion *among* the nine Justices of the Washington Supreme Court (Pet. at 5-10) to mask the lack of any square conflict in authority *between* pertinent appellate courts. In fact, the alleged "proliferation" of conflicting cases is a fiction created by lumping together cases that have totally different holdings and circumstances.

The vast majority of recent cases have involved the unique setting (not present here) of a surety that provides a bond to guaranty the obligations that ERISA imposes on an "employer" as that term is defined by ERISA.[5] Indeed, the main authority relied on by Petitioner below, *JWJ Contracting Co. v. Continental Ins. Co.*, 135 F.3d 672 (9th Cir. 1998), was convincingly distinguished by the Washington Supreme Court on this ground

> because the bond foreclosure actions [in JWJ] *were against the delinquent employers themselves* and did not attempt to shift liability to fund an ERISA plan to a third party. There is a significant difference between plaintiffs enforcing their rights against their employer's bond as opposed to applying a state lien law to recover benefit contributions from a third party to the contract rather than enforce rights under a contract.

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[5] ERISA's civil enforcement scheme provides a specific cause of action against an "employer" to collect the delinquent pension contributions where a "fiduciary" such as a trust fund created under a collective bargaining agreement may sue to enforce provisions of a plan governed by ERISA. 29 U.S.C. § 1132(a)(3). ERISA imposes such liability only on "employers" as required by the terms and conditions of multiemployer benefit plans. 29 U.S.C. § 1145. A pension trustee therefore can sue an "employer" to collect contributions due under Section 1145. *Romney v. Lin*, 105 F.3d 806, 810 (2d Cir. 1997). ERISA's civil enforcement mechanism is intended to be the exclusive method of enforcing its substantive provisions. *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987); *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985).

Pet. at 12(a) (emphasis added). In this Court, Petitioner no longer relies on this case – and properly so. In *JWJ Contracting*, the actual ERISA "employer" (JWJ) was sued together with *its surety* who had contractually assumed the ERISA obligation of its principal (the employer). In this setting, there has indeed been considerable litigation in recent years and some courts have held, as did *JWJ Contracting*, that ERISA does not preempt claims against the *employer's* surety. Here, it is uncontroverted that the ERISA "employer" was the subcontractor Trig Electric, not Respondent Lydig Construction.

Such employer surety cases therefore permit claimants to invoke state law collection procedures to collect debts from responsible parties in line with *Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825, 834 n.10 (1988), which held that a general Georgia garnishment statute was not preempted because it was "merely a procedural mechanism for enforcing judgments" against responsible parties and "create[d] no substantive causes of action, nor new bases for relief, or any grounds for recovery. . . . " In contrast, the bond statute as invoked here by Petitioner squarely shifts the liability to another outside the ambit of ERISA's "employer" definition.

The other cases cited by Petitioner and its amici to show the existence of a square conflict also fall in line with these distinguishable employer surety cases. *Trustees of the Operating Eng'rs Local 825 v. L.B.S. Constr. Co.*, 148 N.J. 561, 691 A.2d 339 (1997) was against the ERISA *employer* together with *its* surety. The New Jersey Supreme Court held that collecting the employer's liability in that manner did not run afoul the ERISA preemption clause since the contractor in that case was

already responsible for its "employer" liability under ERISA. *Eacott v. Ins. Co. of North America*, 40 Conn. App. 777, 673 A.2d 587 (1996) is irrelevant, both because the opinion is not that of a state court of last resort court and is therefore to be disregarded for purposes of determining whether to exercise certiorari jurisdiction,[6] but also because the Connecticut Court of Appeals relied wholly on a Second Circuit case that again turned exclusively on the liability of an employer's surety, *Greenblatt v. Delta Plumbing and Heating Corp.*, 68 F.3d 561 (2d Cir. 1995). *Carpenters Local 261 Health and Welfare Fund v. National Union Fire Ins. Co.*, 686 A.2d 1373 (Pa. Cmwlth. 1996) again involves only a lower state appellate court and again only involves the responsibilities of the employer's surety. In that case, the Commonwealth Court of Pennsylvania simply found that a surety acting directly on behalf of the ERISA employer may not escape its responsibilities under the bond, following *Ragan v. Tri-County Excavating, Inc.*, 62 F.3d 501 (3d Cir. 1995), where a union had entered into a collective bargaining agreement with a company known as Tri-County. Tri-County was found to be the alter ego of another company known as Mele Construction, and therefore the Third Circuit allowed the union to sue the bond provided by Mele in view of the lack of corporate separation between Mele and Tri-County. *Ragan*

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[6] *See* Supreme Court Rule 10. So too with the intermediate appellate court opinion in *Seaboard Surety Co. v. Indiana State Dist. Council of Laborers and Hod Carriers Health and Welfare Fund*, 645 N.E.2d 1121 (Ind. App. 2d Dist. 1995), a case that in any event also did not involve any transfer of pension liability to a stranger to the payment obligation and therefore falls in line with the employer surety cases summarized above.

thus falls in line with the general cases holding that a surety of the ERISA "employer" cannot avoid its bond obligation on the basis of preemption. There is no allegation or proof of a comparable alter ego status between Respondent and the defaulting subcontractor (Trig Electric) in this case. *See also In re Coyne Elec. Contractors, Inc.*, 244 B.R. 245, 252 (Br. S.D.N.Y. 2000) ("there is no shifting of liability here" where employer Coyne admitted its liability for the lien).

Once these easily distinguishable employer surety cases are removed from the mix, the great majority of cases before and after *Travelers* hold that state bond statutes impermissibly augment the exclusive remedy enacted by Congress and thereby create an alternative enforcement mechanism against a hitherto non-liable party. *Plumbing Industry Bd., Plumbing Local Union No. 1 v. E.W. Howell Co., Inc.*, 126 F.3d 61, 68, 69 (2d Cir. 1997) ("because the state law impermissibly adds to the exclusive list of parties ERISA holds responsible for the employer's benefit obligations, it cannot stand."); *Eklecco v. Iron Workers Locals 40, 361 & 417 Union Sec. Funds*, 170 F.3d 353, 357 (2d Cir. 1999) (same); *Trustees of Detroit Carpenters Health & Welfare Fund v. Unified Carpentry Contractors, Inc.*, Lexis 14453 at 6-7 (E.D. Mich. Sep. 3, 1999); *Carpenters Health & Welfare Trust Fund for California v. Tri-Capital Corp.*, 25 F.3d 849, 853 (9th Cir. 1994); *Trustees of the Elec. Workers Health & Welfare Trust v. Marjo Corp.*, 988 F.2d 865, 867 (9th Cir. 1993); *Sturgis v. Herman Miller, Inc.*, 943 F.2d 1127, 1130 (9th Cir. 1991); *Bricklayers Local 33 Benefit Funds v. America's Marble Source, Inc.*, 950 F.2d 114 (3d Cir. 1991); *Chestnut-Adams Ltd. P'ship v. Bricklayers and*

Masons Trust, 415 Mass. 87, 612 N.E.2d 236 (1993); *Carpenters S. Cal. Admin. Corp. v. El Capitan Dev. Co.*, 53 Cal. 3d 1041, 1051, 811 P.2d 246, 282 Cal. Rptr. 277 (1991); *Edwards v. Bethlehem Steel Corp.*, 554 N.E.2d 833, 837 (Ind. Ct. App. 1990). Weighed against this consistent line of authority, there is no "compelling" need to take review here just because the recently surfaced opinion in *Carpenters Local Union No. 26 v. U.S. Fidelity & Guaranty Co.*, 215 F.3d 136 (1st Cir. 2000) may have taken a different tack. *See* Supreme Court Rule 10. At a minimum, any new and superficial schism should be allowed to percolate.[7]

As a result, the opinion below is in line with the great weight of *pertinent* authority. Petitioner and its amici have misleadingly lumped disparate lines of authority together in their haste to create a square conflict where none exists. The opinion below does not conflict with cases holding that trust funds may sue sureties that furnish bonds to secure the "employer" liability created by ERISA.

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[7] Moreover, *Hawaii Laborers Trust Funds v. Maui Prince Hotel*, 81 Haw. 487, 918 P.2d 1143 (1996), cited by Petitioner to establish a split in authority after *Travelers*, does not even cite this Court's *Travelers* decision and therefore is misleadingly represented to this Court as part of a proliferation where "the courts continue to be in conflict about whether third party lien statutes fall within ERISA's preemptive reach" after *Travelers*. Pet. at 10.

III.

PETITIONER'S POLICY ARGUMENT SHOULD BE ADDRESSED TO CONGRESS

Petitioner reverts to a blatant policy argument that state lien laws should, regardless of what ERISA currently requires, be made available for recovery of unpaid contributions. Pet. at 12-13. Not only does the current system correctly place the burden on trustees to vigilantly enforce their collection remedies provided by ERISA, responsibility for correcting any flaw in the current system would lie exclusively with Congress.

First, while Petitioner plainly wants to engage the sympathies of the Court by asserting that employee benefits are at stake, there is *no* evidence any employees failed to receive benefit credits for hours worked on the project. On the contrary, as Petitioner candidly concedes, the plan awards credit to employees regardless of whether employer contributions are paid. Pet. at 12, n.4. As for alleged underpayments to the trusts, it is beyond doubt they have both the primary *statutory* responsibility and the superior *practical* opportunity to prevent the problem from occurring because of the strong remedies against "employers" conferred by ERISA and the collective bargaining agreement. The claim here is based on alleged underpayments by the subcontractor to the trust beginning in June 1997 and ending in January 1998, and the collective bargaining agreement's self-help mechanisms could easily have been invoked as soon as underpayments began to occur, including specifically the right to increase the amount of the fringe benefit bond provided

by the employer's surety or to require payment of benefit contributions in advance.[8]

Thus, the burdens and incentives for enforcement are where Congress put them under ERISA's detailed scheme – the trusts, having enhanced federal statutory remedies (such as the right to collect liquidated damages, 29 U.S.C. § 1132(g)(2)(C)(ii)), must exercise due diligence to ensure that benefit contributions are paid in a timely manner by the responsible parties. *Central States, Southeast & Southwest Areas Pension Fund v. Central Transp., Inc.*, 472 U.S. 559, 572, 580 (1985) (benefit plan trustee has fiduciary duty to assure full and prompt collection of contributions owed by employer to plan). There is simply no "compelling" policy reason to disturb the existing remedial scheme created by Congress.

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[8] *See* App. at 8-10. Under Section 4.01 of the collective bargaining agreement, the *employer* (Trig Electric) was required to post a fringe benefit bond "to ensure the timely payment of all delinquent contributions, delinquent damages, cost of suit, attorneys' fees payable to all fringe benefit funds, to which Employers are required to contribute under the terms of this Agreement." The remedies open to the union under this section of the collective bargaining agreement were several, including the right to "quadruple" the amount of the fringe benefit bond, the right to "withhold" labor from a particular project until the bond (or the quadrupled bond) is obtained as well as the "authority to increase the amount of the fringe benefit bond" in the event the employer (Trig Electric) fails to make payment of any fringe benefits. As a result, the collective bargaining agreement creates a deliberate and negotiated scheme for collateralizing the employer's obligation to pay fringe benefits to the ERISA funds. A central aspect of this scheme is a payment bond – a bond required to be secured by the employer (Trig Electric) and a surety of its choosing.

Second, even if Petitioner's inequity claim had any merit, any remedy would lie with Congress, not this Court. Pet. at 14. Petitioner raises a red herring argument of the first order by contending that unionized employees who receive wages under ERISA plans funded by employer contributions are barred from recovery under *prevailing wage statutes* for comparable wages and benefits. First of all, *there is not now and never has been a prevailing wage statute issue in this case.* Petitioner elected *not* to sue under the Washington prevailing wage statute, RCW 39.12.010, and expressly disclaimed any prevailing wage claim throughout this litigation, including a concession to such effect at oral argument in the Washington Supreme Court.

In any event, the right of unionized employees to proceed under state prevailing wage statutes is not necessarily foreclosed as at least one amicus direly warns. In fact, an intermediate appellate court in Washington held in 1997 that Washington's prevailing wage statute was not preempted by ERISA[9] and it remains to be decided by Washington's court of last resort whether or not such claims are preempted (and, if not preempted, whether they can be enforced through the lien statutes). For purposes of this case, this much is abundantly clear – no prevailing wage statute claim was asserted or preserved below. This Court need not and should not entertain such a claim at this late stage.

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[9] *Ironworkers District Council v. Woodland Park Zoo Planning and Development*, 87 Wn. App. 676, 942 P.2d 1054 (1997).

Finally, prudential considerations weigh against review in this particular case since the opinion below merely declined to overrule Washington's preexisting interpretation of ERISA preemption as applied to the bond statute, *Puget Sound Electrical Workers Health and Welfare Trust Fund v. Merit Co.*, 123 Wn.2d 565, 870 P.2d 960 (1994) ("*Merit*"). The issue below was not one of first impression but rather whether the Washington Supreme Court should overrule *Merit* in spite of the doctrine of *stare decisis*. Pet. at 4a. The Washington Supreme Court definitively invoked state law *stare decisis* doctrine as "requir[ing] a clear showing that an established ruled is incorrect and harmful before it is abandoned" and held Petitioner "has not met this substantial burden" under state law. Pet. at 13a-14a (emphasis added). "Accordingly we decline IBEW's invitation to overrule *Merit*."

IV.

CONCLUSION

Petitioner's lack of standing obviates the petition. Moreover, Petitioner's ambitious attempt to create a relevant split in authority fails, since the employer surety cases and the cases analogous to this case are apples and oranges. If Congress enacted a scheme that Petitioner considers inequitable (notwithstanding its superior data to diligently collect unpaid contributions), then it is for Congress to enact a new remedy. Respondents respectfully request that this Honorable Court deny the petition.

RESPECTFULLY SUBMITTED, this 22 day of March, 2001.

DAVIS WRIGHT TREMAINE LLP
Attorneys for Respondents Lydig Constructions, Inc. and Fidelity & Deposit Company of Maryland

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APPENDIX A

FIRST AMENDED NOTICE OF CLAIM OF LIEN
Against Bond and Retained Percentage
(RCW 39.08.030; 39.12.050; 60.28.010; 19.28.120)

To: Department of General Administration

And To: Lydig Construction, Inc.

And To: Trig Electric Construction Co., Inc.

And To: Fidelity & Deposit Company of Maryland

Notice is hereby given that the undersigned Local 46 IBEW (Union), the representative of the employees of Trig Electric Construction Co., Inc. (Employer), has claims for $45,142.07 in unpaid employee benefit contributions, $4,286.16 in liquidated damages and $2,330.98 in interest plus costs and attorneys' fees, for the months of December 1997 and January 1998 against the Payment and Performance Bond No. CMB08047662, issued by Fidelity & Deposit Company of Maryland to Lydig Construction, Inc. for work performed on Archives/BCC Building, Bellevue, Washington, Project No. 94-021H by the employees of Trig Electric Construction Co., Inc.

The Employer has not paid required employee benefits or wages, or an equivalent amount, for work performed on the project, and therefore has not paid the prevailing wage required by RCW 39.12.010 et seq.

/s/

Michael H. Korpi, WSBA #12711
DONALDSON, KIEL &
McKENZIE, P.S.
Attorneys for Claimants
720 Olive Way, Suite 1605
Seattle, WA 98101
Tel. No. (206) 224-9900

SUBSCRIBED AND SWORN to before me this 17th day of July, 1998.

/s/
NOTARY PUBLIC in and for the State of Washington, residing at Renton.
My Commission Expires 2/16/00

APPENDIX B

R. JOSEPH WESLEY
JUDGE OF THE SUPERIOR COURT
KING COUNTY COURTHOUSE
SEATTLE, WASHINGTON 98104-2312

April 15, 1999

Melvin R. Kang
Attorney at Law
18 W. Mercer Street, #300
Seattle, WA 98119

Dale R. Ulin
Attorney at Law
1501 Fourth Avenue, #2180
Seattle, WA 98101

Re: *Ironworkers District Council v. University of Washington* King County Cause No. 98-2-03821-7 SEA

Dear Counsel:

This letter will serve as a brief Memorandum Decision in the above-referenced matter brought before the Court on Defendants' Motion to Dismiss. Enclosed herewith is a copy of the Order entered this day reflecting the decision herein.

Based upon the holding in the case of *Ironworkers District Council v. Board of Regents*, 970 P.2d 351 (1999), the Plaintiff's complaint as it presently stands would have to be dismissed because the Plaintiff alleges its entitlement to pursue this matter as an "interest party." However, Plaintiff now contends that it has standing as assignee of certain individual members. At the hearing on the instant motion, Plaintiff moved orally to amend its complaint to

allege its status pursuant to the assignments. Both counsel agree that the dispositive issue as to whether such an amendment would save the Plaintiff's case depends upon whether the previously filed lien upon which the instant foreclosure is based is sufficient. In other words, if the filed lien is defective as to the individual members on behalf of whom Plaintiff would seek to amend its complaint as assignee, then such an amendment would be futile, and Plaintiff's motion to amend should be denied, and Defendant's Motion to Dismiss should be granted.

The Court concludes that the underlying lien filed herein is substantially defective. It follows from the holding by the Court of Appeals in *Ironworkers* that the Council could not file a lien in its own name as an "interested party." Likewise, from the dicta in *Ironworkers*, it could presumably file a lien as assignee of specific workers. But in any event, at a minimum the lien notice must inform the parties against whom the lien is asserted of the identification of the claiming parties. Although substantial compliance is often sufficient, the failure to identify the lien claimants is not an insubstantial defect. In fact, as filed, the lien misidentifies the claimant. The purported assignments later obtained do not help Plaintiff in this regard. At the time the lien was filed, the party claiming the lien, the Council, had no assignments. It is even questionable whether the lien would have been sufficient as filed had the Council had in hand assignments from individuals, where the lien filing does not put the parties against whom the lien is asserted on notice of the claiming parties.

Based upon the foregoing, Defendant's Motion to Dismiss has been granted.

Thank you both for your excellent presentations.

Sincerely,

/s/

R. JOSEPH WESLEY
Judge

cc: Court File

APPENDIX C

NOTICE OF CLAIM OF LIEN
Against Bond and Retained Percentage
(RCW 39.08.030; 39.12.050; 60.28.010; 19.28.120)

To: Department of General Administration

And To: Lydig Construction, Inc.

And To: Trig Electric Construction Co., Inc.

And To: Fidelity & Deposit Company of Maryland

Notice is hereby given that the undersigned Local 46 IBEW (Union), the representative of the employees of Trig Electric Construction Co., Inc. (Employer), has claims for $45,142.07 in unpaid employee benefit contributions, $4,286.16 in liquidated damages, $788.81 in interest, and $200 in attorneys' fees for the delinquent months of December 1997 and January 1998 against the Payment and Performance Bond No. CMB08047662 issued by Fidelity & Deposit Company of Maryland to Lydig Construction, Inc., for work performed on Archives/BCC Building, Bellevue, Washington, Project No. 94-021H by the employees of Trig Electric Construction Co., Inc.

The Employer has not paid required employee benefits or wages, or an equivalent amount, for work performed on the project, and therefore has not paid the prevailing wage required by RCW 39.12.010 et seq.

/s/

Michael H. Korpi, WSBA #12711
DONALDSON, KIEL &
McKENZIE, P.S.
Attorneys for Claimants
720 Olive Way, Suite 1605
Seattle, WA 98101
Tel. No. (206) 224-9900

SUBSCRIBED AND SWORN to before me this 24th day of March, 1998.

/s/
NOTARY PUBLIC in and for the State of Washington, residing at Renton.

My Commission Expires 2/16/00

APPENDIX D

ARTICLE IV
FRINGE BENEFITS

Section 4.01(a) **FRINGE BENEFIT BOND**. Employers employing from one (1) to ten (10) workers shall be required to post a five thousand dollar ($5,000) fringe benefit bond with the administrative agent of the Local Union No. 46, IBEW Health and Welfare Trust to insure the timely payment of delinquent contributions, liquidated damages, cost of suit, attorney fees payable to all fringe benefit funds, to which Employers are required to contribute by the terms of this Agreement. Employers employing eleven (11) or more workers shall be required to post a ten thousand dollar ($10,000) fringe benefit bond with the same administrative agent and for the same purposes. The Union shall have the responsibility of monitoring the number of workers of an Employer to insure compliance with this provision. NECA and the Union have agreed to develop language to protect the fringe benefits by enacting a mutually agreed upon variable rate fringe benefit bond. IT is further agreed that the language will be made part of the Agreement prior to May 31, 1996.

(b) In the event an employer fails at any time to secure, maintain, renew or otherwise keep in full force and effect a fringe benefit bond in accordance with the provisions of section 4.01(a), the Union and NECA shall immediately provide the employer with a written notice stating that said employer is in violation of this agreement and demanding that the said employer obtain and produce satisfactory evidence documenting the existence of a suitable bond within forty-eight (48) hours. If the

employer fails to remedy the violation within forty-eight (48) hours following receipt of notice from the Union and NECA, said employer shall be deemed in default under section 4.01(a) and the amount of the fringe benefit bond applicable to said employer shall automatically quadruple. An employer in default under section 4.01(a) shall not be permitted to hire, employ or retain apprentices or unindentured and apprentices shall be rotated to other employers as sufficient employment opportunities become available. In addition, the Union may direct or request the workers employed by an employer in default under Section 4.01(a) to withhold their labor until such time as an appropriate fringe benefit bond is obtained. In the event a worker loses any time while in compliance with a union directive or request to withhold labor due to his/her employer's failure to obtain a fringe benefit bond, such lost time shall be regarded as time worked and the employer shall pay the wages, fringe benefits contributions required under the terms of this agreement for the entire period of time during which labor has been withheld. The Union shall have the authority to require payment of such wages, fringe benefits contributions as a condition precedent to the return to work by the affected employees.

(c) In the event an Employer fails to make a timely payment to any of the fringe benefit funds the trustees of such funds shall have the authority to increase the amount of the fringe benefit bond applicable to said Employer under section 4.01(a) and/or to require said Employer to discharge its future total monthly fringe benefit Liability in advance for such time as the Trustees deem appropriate. The monthly fringe benefit amount

payable in advance shall equal the average of the three highest monthly contributions made by said Employer during the twelve (12) month period immediately preceding the most recent delinquency or manpower will be withheld.

MOTION FILED

MAR 2 3 2001

No. 00-1329 (4)

IN THE

Supreme Court of the United States

CARPENTERS HEALTH AND WELFARE TRUST FUND FOR CALIFORNIA; CARPENTERS PENSION TRUST FUND FOR NORTHERN CALIFORNIA, CARPENTERS VACATION AND HOLIDAY TRUST FUND FOR NORTHERN CALIFORNIA,
(Additional Petitioners Listed on Inside Cover),
Petitioners,

v.

TRIG ELECTRIC CONSTRUCTION CO., A WASHINGTON CORPORATION; LYDIG CONSTRUCTION, INC.; FIDELITY AND DEPOSIT COMPANY OF MARYLAND; AND DEPARTMENT OF GENERAL ADMINISTRATION,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Washington

MOTION OF MULTI-EMPLOYER TRUST FUNDS TO FILE BRIEF AS *AMICI CURIAE*; AND BRIEF OF *AMICI CURIAE* IN SUPPORT OF THE PETITIONERS

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16 pp

Additional Petitioners:

CARPENTERS TRAINING TRUST FUND FOR NORTHERN CALIFORNIA, CARPENTERS ANNUITY TRUST FUND FOR NORTHERN CALIFORNIA, LABORERS HEALTH AND WELFARE TRUST FUND FOR NORTHERN CALIFORNIA, LABORERS VACATION-HOLIDAY TRUST FUND FOR NORTHERN CALIFORNIA, LABORERS PENSION TRUST FUND FOR NORTHERN CALIFORNIA, LABORERS TRAINING AND RETRAINING TRUST FUND FOR NORTHERN CALIFORNIA, CEMENT MASONS HEALTH AND WELFARE TRUST FUND FOR NORTHERN CALIFORNIA, CEMENT MASONS PENSION TRUST FUND FOR NORTHERN CALIFORNIA, CEMENT MASONS VACATION TRUST FUND FOR NORTHERN CALIFORNIA, CEMENT MASONS APPRENTICESHIP AND TRAINING TRUST FUND FOR NORTHERN CALIFORNIA, OPERATING ENGINEERS HEALTH AND WELFARE TRUST FUND FOR NORTHERN CALIFORNIA, PENSION TRUST FUND FOR OPERATING ENGINEERS, PENSIONED OPERATING ENGINEERS HEALTH AND WELFARE FUND, OPERATING ENGINEERS AND PARTICIPATING EMPLOYERS PRE-APPRENTICESHIP, APPRENTICE AND JOURNEYMEN AFFIRMATIVE ACTION TRAINING FUND.

MOTION OF MULTI-EMPLOYER TRUST FUNDS FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The Various Trust Funds representing certain trade workers in California ("the Trust Funds)" hereby move the Court pursuant to Supreme Court rule 37.2 for leave to file the accompanying brief as *amici curiae* in support of the Petition for Writ of Certiorari filed on February 12, 2001 in U.S.S.C. No. 00-1329.

The *Amici Curiae* are the following Trust Funds ("Trust Funds"); Carpenters Health and Welfare Trust Fund for California; Carpenters Pension Trust Fund for Northern California, Carpenters Vacation and Holiday Trust Fund for Northern California, Carpenters Training Trust Fund for Northern California, Carpenters Annuity Trust Fund for Northern California, Laborers Health and Welfare Trust Fund for Northern California, Laborers Vacation-Holiday Trust Fund for Northern California, Laborers Pension Trust Fund for Northern California, Laborers Training and Retraining Trust Fund for Northern California, Cement Masons Health and Welfare Trust Fund for Northern California, Cement Masons Pension Trust Fund for Northern California, Cement Masons Vacation Trust Fund for Northern California, Cement Masons Apprenticeship and Training Trust Fund for Northern California, Operating Engineers Health and Welfare Trust Fund for Northern California, Pension Trust Fund for Operating Engineers, Pensioned Operating Engineers Health and Welfare Fund, Operating Engineers and Participating Employers Pre-Apprenticeship, Apprentice and Journeymen Affirmative Action Training Fund, in support of this motion, the Trust Funds state the following:

1. This motion is necessitated by the failure of Lydig Construction, Inc., Fidelity and Deposit Company of Maryland, and Department of General Administration, Respondents, upon request, to give written consent to the filing of a brief by the *amici* applicants herein. The consent of Petitioner, International Brotherhood of Electrical Workers, Local Union No. 46, and of Respondent Trig Electric has been obtained.

2. The Trust Funds are multi-employer trust funds established pursuant to the provision of Labor Management Relations Act of 1974, as amended, Section 302(c), 29 U.S.C. 186(c). All of the Trust Funds are employee benefit funds within the meaning of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. Section 1001, *et seq.*, and are subject to federal regulation pursuant to the provisions of ERISA.

3. Each Trust Fund was established by a collective bargaining agreement. Each Trust Fund administers benefit plans ("Plan" or "Plans") that are funded with monies that otherwise would be paid to employees as wages or salaries. These Plans are a result of collective bargaining between employers and unions.

4. The Trust Funds seek leave to file the attached brief in order to make this Court aware of the serious legal, fiscal, and public policy implications of the Washington State Supreme Court's ruling in *International Brotherhood of Electrical Workers, Local Union No. 46 v. Trig Electric Construction Co.; Lydig Construction, Inc.; Fidelity and Deposit Company of Maryland and Department of General Administration* No. 98-2-26652-0 SEA, 43 P.2d 622 (1999). The Washington State Supreme Court's holding that state third-party lien statutes fall within ERISA's preemptive reach has a potentially devastating effect upon the welfare of millions of

workers. The decision thwarts the intent of Congress to protect beneficiaries and compromises the Trustee's fiduciary duty to collect benefits on behalf of its beneficiaries.

5. The financial integrity of the Plans is also in jeopardy if it is found that ERISA prohibits the Trust Funds from collecting delinquent contributions through third-party lien statutes. Unscrupulous employers will have a loophole to shirk their obligations while participants and beneficiaries will lose hard-earned benefits, which are equivalent to a loss of wages.

6. Because of the split among state courts and federal circuits regarding this issue, only a clear decision by this Court will resolve this problem.

7. These *amici* are in a unique position to advise the Court with regard to the implications of the *Trig Electric* decision because of their familiarity with the structure, administration, and purposes of multi-employer trust funds as well as their reliance upon state third-party lien laws to collect delinquent contributions.

WHEREFORE, the Trust Funds respectfully request that they be granted leave to file the accompanying brief as *amici curiae*.

Respectfully submitted,

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BRIEF OF THE MULTI-EMPLOYER TRUST FUNDS AS *AMICI CURIAE* IN SUPPORT OF THE PETITION

NOW COME the *Amici Curiae*,[1] Trust Funds representing certain Trade Workers in California who submit this brief in support of the Petition for A Writ of Certiorari in No. 00-1329.

The *Amici Curiae* are the following Trust Funds: Carpenters Health and Welfare Trust Fund for California; Carpenters Pension Trust Fund for Northern California, Carpenters Vacation and Holiday Trust Fund for Northern California, Carpenters Training Trust Fund for Northern California, Carpenters Annuity Trust Fund for Northern California, Laborers Health and Welfare Trust Fund for Northern California, Laborers Vacation-Holiday Trust Fund for Northern California, Laborers Pension Trust Fund for Northern California, Laborers Training and Retraining Trust Fund for Northern California, Cement Masons Health and Welfare Trust Fund for Northern California, Cement Masons Pension Trust Fund for Northern California, Cement Masons Vacation Trust Fund for Northern California, Cement Masons Apprenticeship and Training Trust Fund for Northern California, Operating Engineers Health and Welfare Trust Fund for Northern California, Pension Trust Fund for Operating Engineers, Pensioned Operating Engineers Health and Welfare Fund, Operating Engineers and Participating Employers Pre-Apprenticeship, Apprentice and Journeymen Affirmative Action Training Fund.

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[1] No counsel for any party to this dispute authorized this brief in whole or in part and no person or entity, other than *amici curiae* and their members, made a monetary contribution to the preparation or submission of this brief. Petitioner has consented to the filing of this brief.

INTEREST OF THE *AMICI CURIAE*

The Trust Funds are multi-employer trust funds established pursuant to the provisions of the Labor Management Relations Act of 1974 ("LMRA"), as amended, Section 302 (c), 29 U.S.C. § 186 (c). All of the Trust Funds are employee benefit funds within the meaning of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001, *et. seq.*, and are subject to federal regulation pursuant to the provisions of ERISA and the LMRA. Each of these Trust Funds owes the fiduciary duty to collect delinquent trust fund contributions and to that end, where applicable, relies on the use of California's mechanics lien laws to facilitate collection. Wholesale ERISA preemption of state lien laws, as suggested by the *Trig Electric* decision, would seriously jeopardize the Trust Funds' ability to collect delinquent contributions and, in turn, hamper their ability to fulfill their statutorily-mandated fiduciary duties.

The Trust Funds are in a unique position to advise the court with regard to the implications of the *Trig Electric* decision because of their familiarity with the structure, administration, and purposes of multi-employer trust funds and the practical difficulties encountered in the collection process.

SUMMARY OF ARGUMENT

This Petition presents an issue of critical nationwide importance that should be resolved by this Court. This case affects the means by which a vast number of workers throughout the country receive their medical, vacation, pension and other benefits. At issue here is the ability of multi-employer trust funds, such as the *Amici*, to use routine state-created mechanisms for the collection of monies owed by employers for those benefits. Congress's objectives in enacting ERISA and its preemption clause were to affirm the paramount duty of trust funds to protect and secure these benefits for employees. Yet, the Washington Supreme

Court's decision in *Trig Electric* defies these Congressional purposes by its holding that the Washington lien statute regulates how ERISA plans are funded and is therefore not "outside the preemptive scope of ERISA." This decision is plainly wrong as a matter of law, and violates the principles of federalism underlying this Court's preemption jurisprudence. Allowed to proliferate, the reasoning of *Trig Electric* would result in the preemption of an enormous array of state laws that are of assistance to ERISA-governed plans in the collection of monies owed to them. Review should be granted to prevent that disaster. This case affects Trust Funds throughout the United States, including California, that utilize state mechanics lien laws to collect delinquent contributions. In light of the conflict between the decision below and those of other courts as well as those of this Court, the writ should issue.

REASONS FOR GRANTING THE WRIT

I. The Washington Supreme Court's Application of ERISA preemption to State Lien Laws would Impair the Protection of Employee Benefits by Depriving the Trust Funds of Important Collection Methods.

"Multi-employer employee benefit plans are something of the darlings of Congress." *Benson v. Brower's Moving & Storage, Inc.*, 726 F. Supp. 31, 34 (E.D. N.Y. 1989). ERISA's essential purpose is to protect the rights of employees, not the rights of employers. ERISA Section 2(b), 29 U.S.C. § 1001(b). The fiduciary mandate is clear: "trustees have an obligation to enforce the terms of the collective bargaining agreement regarding employee fund contributions against the employer for the sole benefit of the beneficiaries of the fund." *NLRB v. Amax Coal Co., A Div. of Amax, Inc.*, 453 U.S. 322, 336-337 (1981)) (emphasis in original).

ERISA's preemption provision, 29 U.S.C. § 1144(a), was not intended to limit the means by which trust funds could protect these interests. Rather, the intent of ERISA preemption was to simplify the "administrative procedures" to avoid "the burden that would be imposed by a patchwork scheme of regulation." *Fort Halifax Packing Co., Inc. v. Coyne*, 482 U.S. 1, 11-12 (1987). The fact that Congress favors multi-employer employee benefit plans is nothing new. For example, the anti-inurement provision of ERISA, 29 U.S.C. § 1103(c)(1), has the "intentionally one-sided purpose of protecting employees and protecting the financial integrity of pension plans." *Kwatcher v. Massachusetts Service Employees Pension Fund*, 879 F.2d 957, 961 (1st Cir. 1989).

Under the *Trig Electric* decision, ERISA preemption, meant as an aid to the employee benefit plan, is transformed from a benefit to a curse. Still, the Washington Supreme Court attempted to justify its conclusion by claiming that lien laws "interfere" with the "administration of ERISA plans." This cannot be so when ERISA plans, such as those of the Trust Funds, depend on the use of lien statutes, and other state law collection mechanisms, to collect delinquencies. No "interference" was detailed by the *Trig Electric* court and none in fact exists.

Moreover, nowhere in *Trig Electric* did the Washington Supreme Court address how its conclusion could be squared with the statements made by the Congressional Committee when ERISA Section 515 was enacted: "The Committee amendment does not change any other type of remedy permitted under State or Federal law with respect to delinquent multi-employer plan contributions." H.R. Rep. No. 869, 96th Cong., 2d Sess, reprinted in 1980 U.S.C.C.A.N. 2993, 3038.

Not only did the *Trig Electric* court disregard this Congressional intent, it departed from the recent instructions of this Court in *New York State Conference of Blue Cross &*

Blue Shield Plans v. Travelers Inc. Co., 514 U.S. 645 (1995) and *California Division of Labor Standards Enforcement v. Dillingham Constr., N.A.*, 519 U.S. 316 (1997). *Travelers* and *Dillingham* explain exactly how a court is to conduct the preemption analysis—with the "starting presumption" that ERISA does not intend to supplant state law. *Travelers*, 514 U.S. at 653, *Dillingham*, 519 U.S. at 330. The *Trig Electric* court neither started nor ended with this presumption.

In short, the *Trig Electric* decision was rendered in disregard of the Congressional purpose of ERISA and ERISA's preemption clause, and the Petition for Certiorari should be granted.

II. Review Should Be Granted To Prevent Use Of ERISA To Undermine ERISA-Favored Plans And Collectively Bargained Benefits.

Employee fringe benefits are a negotiated part of the collective bargaining agreements supporting multi-employer benefit plans such as those of the Trust Funds here. They are part of the employees' total "wage packet." During negotiations, the employers and unions make trade-offs respecting where the dollars will go, allocating them between hourly pay and contributions to various employee benefit funds. These contributions are not only for retirement benefits; they also fund many other pressing non-wage needs of employees, including health and welfare, vacation, apprenticeship and training. Yet, despite the importance of these benefits, the trust fund contribution process is self-reporting, *i.e.*, on a monthly basis the employer sends in a report of the hours worked for each employee and a check for the fringe benefit contributions owed. Unlike "wages", contributions are held by the employer until the monthly due date. The employer receives the bonus of "floating" the contribution sums for the additional time. But it should never be forgotten that while this money is paid after 'wages" and bypasses the employees' pockets, it is money earned by and

held for the benefit of the employees. Thus, when an employer refuses to pay employee fringe benefit contributions it commits nothing short of thievery of sums held in trust to provide benefits. Unintentional non-payment of contributions poses an equal threat to benefits. In any case, the Trust Funds' fiduciaries retain their duty to collect the money to provide promised benefits.

The *Trig Electric* decision drastically limits a trust fund's ability to rectify thievery and other non-payment of contributions. It would sanction only collection actions and collection methods directly authorized by ERISA Section 502, 29 U.S.C. § 1132. Under the logic of *Trig Electric*, any time a trust fund utilizes a "mechanism" of state law to collect contributions the "mechanism" would "regulate how ERISA plans are funded." A trust fund in possession of a mortgage given for delinquent contributions would "regulate how ERISA plans are funded." A trust fund in possession of a mortgage given for delinquent contributions would not be able to use state law to foreclosure on the property. This is clearly the kind of faulty reasoning with regard to the "relate to" clause which the *Travelers* court cautioned against.

> If 'relate to' were taken to extend to the furthest stretch of its indeterminacy, then for all practical purposes pre-emption would never run its course, for 'really, universally, relations stop nowhere.' *Travelers*, 514 U.S. at 655.

The logic of *Trig Electric* would deprive the Trust Funds of use of mechanics liens, payment bonds and related remedies under the laws of every state. For example, in the California construction industry mechanics liens may be used to collect from the property owner monies owed for wages or materials that were supplied to a construction project. Calif. Civil Code § 3110 *et seq*. Stop notice procedures provide for recovery of such monies from lenders, developers, public entities and

others holding construction funds. Calif. Civil Code §§ 3083, 3103. Wages and materials claims can also be recovered from payment bonds, *id* at § 3096 and bonds issued for release of liens and stop notices. *Id.* at §§ 3143, 3196.

These remedies, necessary to obtain monies from third parties in the construction industry, would be denied uniquely where employee benefit contributions were at issue, under the approach of the Washington Supreme Court.

This flawed approach, by forbidding ERISA-favored interests from using construction remedies available to all others, turns ERISA preemption on its head. Rather than favoring collection of benefit contributions, *Trig Electric* would make their collection impossible in the frequent cases where the contributing construction employer is dissolved, insolvent, or cannot be found. It would also make collection less expeditious in all cases, by necessitating litigation where funds or lien rights are not attached. Congress intended the opposite result, in which payment of contributions would be required and collection facilitated.

The practical effect of limiting the trust funds to those means of collection mentioned expressly provided in ERISA § 502 is that there will be fewer and fewer recoveries of delinquent contributions. This will lead inexorably to weakening of the benefit plans, which depend upon strong collection practices. If *Trig Electric* stands and its erroneous principle is applied in other jurisdictions, the benefits promised under collectively bargained ERISA plans will be placed at risk. Loss of benefits and inferior benefits will result. Who will end up carrying the residual cost of the underinsured, the cost of the retired but destitute? Instead of promoting independence and self-reliance for the American worker, the law will provide disincentives for careful planning and foresight. Social welfare programs will be over-burdened. The only beneficiary of this changed system will be certain unscrupulous employers, to whom the *Trig Electric*

decision is a windfall. Under *Trig Electric* a delinquent contractor will be able to insulate its general contractor from liability under state lien laws and use this loophole to negotiate an advantage in its own subcontract. Only the participant employees lose.

In addition, limiting the methods by which ERISA employee benefit plans can collect delinquent fringe benefits not only discourages unionization in the workplace, abrogating the freedom to choose or not choose union representation codified in the National Labor Relations Act, 29 U.S.C. Section 151, *et seq.*, but blatantly discriminates against the union worker. As observed by the Hawaii Supreme Court in *Laborers' Trust Fund v. Muni Prince Hotel*, 81 Haw. 487, 499 (1996), such an "application of ERISA preemption inequitably distinguishes between two groups of persons" and is contrary to Congressional intent in enacting ERISA. The *Trig Electric's* flawed interpretation of the "relate to" clause effectively and improperly regulates ERISA plans to the status of "second-class creditors." [2] This broad and wrong ruling should be reviewed now.

In sum, ERISA preemption was meant to help multi-employer trust funds meet their duties to administer the plans for the sole and exclusive benefit of the employees, their families and dependents. The *Trig Electric* decision negates this purpose and commits "grave violence," *Travelers*, *supra*, 519 U.S. at 332, to the presumption against preemption. The Petition should be granted to ensure that the very essence of ERISA is not swept away by a distorted view on how state law "regulates" ERISA and by a blind-eye to Congress's repeatedly stated objectives.

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[2] Sackman, Lien On: The Story of the Elimination and Return of Mechanic Lien, Stop Notice and Bond Remedies for Collection of Contributions to Employee Benefit Funds, 20 Berkeley Journal of Employment and Labor Law 254, 282 (1999).

CONCLUSION

For the reasons set forth herein, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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No. 00-1329

In the
SUPREME COURT OF THE UNITED STATES

October Term, 2000

International Brotherhood of Electrical Workers, Local Union No. 46, *Petitioner,*

v.

Trig Electric Construction Co., A Washington Corporation; Lydig Construction, Inc.; Fidelity and Deposit Company of Maryland; and Department of General Administration, *Respondents*

On Petition for a Writ of Certiorari to the Supreme Court of the State of Washington

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AMICUS CURIAE

In Support of Position of
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2000

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 46,
Petitioner,

v.

TRIG ELECTRIC CONSTRUCTION CO., A WASHINGTON CORPORATION; LYDIG CONSRUCTION, INC.; FIDELITY AND DEPOSIT COMPANY OF MARYLAND; AND DEPARTMENT OF GENERAL ADMINISTRATION,
Respondents.

AMICUS CURIAE

IN SUPPORT OF

PETITION FOR WRIT OF CERTIORARI

STATEMENT OF INTEREST OF AMICUS CURIAE

The several Amicus Curiae identified below join together to urge the Court to grant Petitioner's Writ of Certiorari.[1] Pursuant to Rule 37.2, written consent of the parties has been obtained. The Amicus Curiae are identified as follows:

Associations of employers signatory to labor agreements requiring payment of fringe benefit contributions:

Northwest Iron Workers Employer Association, Inc;
National Electrical Contractors, Puget Sound Chapter;
Western Washington Signatory Painting Employers Association.

Labor Organizations representing employees affecting interstate commerce:

International Brotherhood of Painters and Allied Trades District Council No. 5;
Iron Workers District Council of the Pacific Northwest;
Pacific Northwest Regional Council of Carpenters;

Joint Labor-Management Trust Funds, all of which cover participants in multiple states:

The National Roofing Industry Pension Trust Fund;
The Carpenters Health and Security, Retirement, Apprenticeship and Training, and Vacation Trust Funds of Western Washington;
Northwest Ironworkers Health, Pension, Annuity, and Apprenticeship Trust Funds;
Western Washington Painters Defined Contribution Pension and Apprenticeship and Training Trust Funds;
The Employee Painters Trust Fund (Health and Welfare);

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[1] In accordance with Rule 37.6, Counsel for the Amicus Curiae hereby certifies that he is the author of the brief and that no other parties have made any monetary contribution to the preparation or submission of this brief.

The Joint Labor and Management Trust Funds and the Labor Organizations represent approximately thirty thousand covered employee benefits participants throughout the United States. The Employer Associations represent numerous employers signatory to union contracts which require the funding of pension, health and welfare, apprenticeship and training and vacation fringe benefits.

The Washington Supreme Court decision directly affects the uniform administration of all labor and management fringe benefit trust funds, and the obligations of their sponsoring parties.

SUMMARY OF ARGUMENT

The Petitioner's Writ for Certiorari should be granted for the following reasons:

1. Only this Court can resolve the numerous conflicting Federal and State court decisions which directly affect the uniform administration of employee benefits earned by construction industry workers and the contract promises of sponsoring contractors and their sureties throughout the United States.

2. The conflict among the lower courts affects thousands of construction industry workers and their families who rely upon the financial soundness and integrity of their fringe benefit plans.

3. The decision prevents union workers and their fringe benefit plans from enforcing the same rights of employees who do not participate in such plans.

ARGUMENT

1. The Court Should Resolve Conflict of Lower Court Decisions.

Washington, like most states, enacted mechanic's lien statutes and public works lien and bond statutes to protect the public against non-payment of costs incurred in construction projects. Pursuant to the public works lien and bond statutes, Lydig Construction, Inc., General Contractor, was awarded a public works contract for construction. Part of the consideration for this contract was the General Contractor's promise to guarantee the payment of wages for all construction workers on the project – including any subcontractor's workers. For a fee, Fidelity & Deposit Company of Maryland, Surety, also promised in a written surety contract to pay the workers if the subcontractors failed to do so. Now, solely because the workers participated in employee benefit plans covered by The Employee Retirement Income Security Act of 1974, 29 U.S.C. §1001 et seq. (ERISA), the General Contractor and the Surety seek to avoid their written promises.

Even with this Court's guidance in *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645 (1995), Federal and State courts have issued inconsistent decisions both allowing and disallowing the right of labor organizations and joint labor and management trust funds to use state mechanic's lien statutes and state required project bonds to recover unpaid fringe benefit contributions. This inconsistency turns on varied interpretations of ERISA §514(a), 29 U.S.C. §1144(a), and the intent of Congress, not on the peculiarities of the various state construction lien statutes.[2]

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[2] *Compare* cases finding for ERISA preemption: *CSCAC v. El Capitan Development Co.*, 53 Cal.3d 1041, 811 P.2d 296 (1991); *Construction & Gen. Laborers Dist. Council v. McHugh Construction Co.*, 230 Ill.App. 939, 596 N.E.2d 19 (1992); *Edwards v. Bethlehem Steel Corp*, 554 N.E.2d 833 (1990); *Prestridge v. Shinault*, 552 So.2d 643 (1989); *and* cases finding no ERISA preemption: *Seaboard Surety Co. v. Indiana State Council of Laborers*, 645 N.E.2d 1121 (1995); *Chestnut-Adams Limited Partnership v. Bricklayers & Masons Trust*, 415 Mass. 87, 612 N.E.2d 236 (1993); *Eacott v. Ins. Co. of N. America*, 40 Conn.App. 777, 673 A.2d 587 (1996); *Trustees of Operating Engineers Local 825 v. L.B.S. Construction Co.*, 148 N.J. 561, 691 A.2d 339

This inconsistency in interpreting 29 U.S.C. §1144(a) is contrary to the statutory purpose of providing a uniform operating environment for multi-state fringe benefit plans. For example, the Amicus employers, unions and trust funds represent participants and employees who work in both Oregon and Washington. When employees work in Oregon, they work under the security and protection of the Oregon Mechanics lien statute. *IBEW Local 48 v. Oregon Steel Mills, Inc.*, 168 Or.App. 101, 5 P.3d 1122 (2000). However, under the instant case, these same workers working in Washington (including their trust funds and unions) do not have the same protections. They are denied the remedies of Washington's construction lien and project bond statutes. Again, the disparity of treatment turns on the several courts' respective views of §1144 and Congressional intent, not on the language of the applicable state law.

2. The Conflict Among the Lower Courts Affects Thousands of ERISA Covered Workers.

The Amicus Curiae conservatively represent thirty thousand workers throughout the country, all of whom are participants in ERISA fringe benefit plans. Through their labor, these construction workers earn valuable compensation under their labor agreements, including fringe benefit contributions. This Court has acknowledged the importance of a collection remedy for such construction workers in the context of federally-sponsored construction projects. *Sherman v. Carter*, 353 U.S. 210 (1957). Denial of these routine state law creditors remedies affects all parties involved in the collective bargaining environment: the construction workers, the contributing employers, the labor representatives, and the health and welfare, pension, apprenticeship and training and vacation fringe benefit trust funds and plans. Employees are denied payment of their contractually

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(1997); *Hawaii Laborers Trust Funds v. Maui Prince Hotel*, 81 Haw. 487, 918 P.2d 1143 (1996); *Carpenters Local 261 Health & Welfare Fund v. Nat'l. Union Fire Ins. Co.*, 686 A.2d 1373 (1996); *Plumbers Local 458 Holiday Vacation Fund v. Immel, Inc.* 151 Wis.2d 233, 445 N.W.2d 43 (1989). These case citations are representative only and not exhaustive of the numerous state court decisions interpreting ERISA Federal preemption.

promised compensation and compliant employers inevitably pay higher contributions to defray trust fund shortages.

This effect is not limited to Washington State. These remedies under state prevailing wage statutes are found in at least 31 states.[3]

3. The Washington Supreme Court Decision Denies State Law Protections To ERISA Covered Employees Otherwise Afforded To The Rest Of The Public.

The Washington Supreme Court's decision denies the ability of a worker, through his or her union or trust funds, from using state lien and bond remedies to recover contractually promised fringe benefit contributions. This result is exactly the contrary to the Congressional purpose of protecting these kinds of fringe benefit plans under ERISA. ERISA §2a, 29 U.S.C. § 1001a.

The decision denies the protection of state prevailing wage statutes ONLY because the compensation includes ERISA benefits. If allowed to stand, the Washington Supreme Court decision will effectively impair construction employees' federally protected right to participate in an ERISA trust fund. ERISA §510, 29 U.S.C. §1140. Such violation is also a violation of the Civil Rights Act, 42 U.S.C. §1983. This incongruous result is further evidence that Congress did not intend to impair the rights of

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[3] Alaska Stat. § 36.05.010; Ark. Stat. Ann. § 22-9-301; Cal. Lab. Code § 1771; Conn. Gen. Stat. § 31-53; Del. Code Ann. tit. 29 § 6912; Haw. Rev. Stat. § 104; Ill. Ann. Stat. ch. 48 para. 39s-1 to 4; Ind. Code § 5-16-7-1; Ky. Rev. Stat. Ann. §§ 337.505-550; Me. Rev. Stat. Ann. Tit. 26 §§ 1303-1308; Md. State Fin. & Proc. Code Ann. § 17-201; Mass. Gen. L. ch. 5 § 1, ch. 7 § 22(18), ch. 149 §§ 26, 27F, 27G, 27H; Mich. Comp. Laws. Ann. § 408.552; Minn. Stat. Ann. § 177.44; Mo. Ann. Stat. §§ 290.210-290.340; Mont. Code Ann. § 18-2-403; Nev. Rev. Stat. § 338.020; N.J. Stat. Ann. §§ 34:11-56.25-.44; N.M. Stat. Ann. § 13-4-11 to –17; N.Y. Lab. Law § 220; Ohio Rev. Code § 4115.03-.16; Okla. Stat. Ann. Tit. 40 §§ 196.1-.6; Or. Rev. Stat. §§ 279.348-.363; 43 Pa. Cons. Stat. § 165-1 to –17; R.I. Gen. Laws §§ 37-13-7; Tenn. Code Ann. § 12; Tex. Lab. Code Ann. § 5159a; Va. Code Ann. Art. 14, § 64.5; Wash. Rev. Code Ann. §§ 39.12.010-.900; W. Va. Code § 21-5A; Wis. Stat. §§ 66.293, 103.49-.50; Wyo. Stat. §§ 27-4-401 to –413.

ERISA covered employees from state law protection and remedies for non-payment.[4]

In *Nash v. Florida Industrial Commission,* 389 U.S. 235 (1967), the Florida Industrial Commission denied unemployment benefits to an employee because she filed an unfair labor practice charge with the National Labor Relations Board alleging that her lay-off was unlawful under the National Labor Relations Act. The Florida statute denied unemployment benefits to employees involved in a labor dispute. The Court held that the state statute violated §1983 because it required employees to choose between filing a complaint with the NLRB or collecting unemployment benefits.[1]

The Washington Supreme Court Decision denies ERISA covered construction workers the equal protection of state law remedies otherwise afforded to all other state citizens. The Washington Supreme Court has decided that construction employees in ERISA fringe benefit plans may not enforce the same rights as employees who do not participate in ERISA plans.

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[4] See *California Division of Labor Standards Enforcement v. Dillingham Constr., N.A.,* 519 U.S. 316 (1997) (presence of Fitzgerald Act evidence that Congress did not intend to proscribe apprentice portion of prevailing wage statutes.)

[1] See *California Division of Labor Standards Enforcement v. Dillingham Constr., N.A.,* 519 U.S. 316 (1997) (presence of Fitzgerald Act evidence that Congress did not intend to proscribe apprentice portion of prevailing wage statutes.)

CONCLUSION

On behalf of thousands of construction employees throughout the country, the Amicus Curiae respectfully urge the Court to GRANT the Petition for Writ of Certiorari.

Respectfully submitted,

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March 6, 2001

Supreme Court, U.S.
FILED
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No. 00-1329

In the
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2000

International Brotherhood of Electrical Workers, Local Union No. 46, *Petitioner,*

v.

Trig Electric Construction Co., a Washington corporation; Lydig Construction, Inc.; Fidelity and Deposit Company of Maryland; and Department of General Administration, *Respondents.*

On Petition for a Writ of Certiorari to the Supreme Court of the State of Washington

PETITIONER'S REPLY MEMORANDUM

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No. 00-1329

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2000

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 46,
Petitioner,

v.

TRIG ELECTRIC CONSTRUCTION CO., A WASHINGTON CORPORATION; LYDIG CONSTRUCTION, INC.; FIDELITY AND DEPOSIT COMPANY OF MARYLAND; AND DEPARTMENT OF GENERAL ADMINISTRATION,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

PETITIONER'S REPLY MEMORANDUM

Respondents' argument concerning the petitioner Union's standing is without merit. In finding that a union had standing to challenge an agency's interpretation of a statute providing benefits to workers who lost jobs because of competition from imports, this Court reiterated its governing principles concerning associational standing in *United Automobile Workers v. Brock*, 477 U.S. 274 (1986):

It has long been settled that "[e]ven in the absence of injury to itself, an association may have standing solely as the representative of its members." [Citations.] . . . [W]e have found that, under certain circumstances, injury to an organization's members will satisfy Article III and allow that organization to litigate in federal court on their behalf. See *Simon v. Eastern Kentucky Welfare Rights Organization,* 426 U.S. 26, 40 (1976). In *Warth [v. Seldin,* 422 U.S. 490 (1975)], we set out the nature of these circumstances:

> "The association must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit. . . . . So long as this can be established, and so long as the nature of the claim and of the relief sought does not make the individual participation of each injured party indispensable to proper resolution of the cause, the association may be an appropriate representative of its members, entitled to invoke the court's jurisdiction." *Id.,* 422 U.S., at 511.

Subsequently, this doctrine was stated as a three-part test:

> "[A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the

> claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Washington State Apple Advertising Comm'n,* 432 U.S. 333, 343 (1977).

Brock, 477 U.S. at 281-82.

This Court has found that the first two prongs of this test ensure satisfaction of Article III requirements for injury in fact, causal connection to the defendant's conduct, and redressability. *United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.,* 517 U.S. 544, 555 (1996). But the third prong is "prudential," i.e., a judicially self-imposed limit on federal jurisdiction that is not constitutionally mandated. "Hence the third prong of the associational standing test is best seen as focusing on these matters of administrative convenience and efficiency, not on elements of a case or controversy within the meaning of the Constitution." *United Food & Commercial Workers, supra,* 517 U.S. at 557. The third prong protects against the risk of "litigating a case to the damages stage only to find the plaintiff lacking detailed records or the evidence necessary to show the harm with sufficient specificity." *Id.* at 556. But ultimately the test is whether the circumstances of the case and the relief requested make individual participation of the association's members indispensable. *Warth,* 422 U.S. at 511.

In this case, the petitioner Union is the duly authorized collective bargaining representative of Trig Electric Construction Co.'s employees, and the Union's complaint so alleges. Complaint for Foreclosure of Labor Lien, ¶ 9. (App., *infra,* 3a) The Union is therefore the associational representative of Trig's employees. *United Food & Commercial Workers, supra,* 517 U.S. at 556 n.6. The first prong of the standing test is satisfied because the Washington public works lien statutes permit workers to file liens for unpaid wages and

benefits and to foreclose on them in their own right. The second prong is also satisfied because recovery of the electrical workers' unpaid benefits is germane to the Union's purpose. And the third prong of the associational standing test — which is not constitutionally mandated — is likewise satisfied: the Union has established the amount of its members' claims, both individually and collectively, through an audit of Trig Electric's payroll records. (R.124-181) Having thus satisfied "these matters of administrative convenience and efficiency" required by the third prong, 517 U.S. at 557, the Union has amply met this Court's standing requirements.

Moreover, this case is factually distinguishable from *Ironworkers District Council v. Board of Regents,* 93 Wn.App. 735, 790 P.2d 351 (1999), cited by respondents. In that case, the union sued only as an "interested party," a term of art under the state prevailing wage statute, and not as a representative of the affected workers. The court found only that the union lacked standing on that basis. In this case, on the other hand, the Union's complaint does not allege "interested party" status, and it specifically sets forth the Union's claims in its capacity "as the exclusive representative of the employees of Trig." Complaint, ¶ 9. (App., *infra,* 3a)

Finally, the Union has standing because its claims derive from a collective bargaining agreement to which it was a party. Complaint, ¶¶ 6 and 7 and Appendix A attached thereto. (App., *infra,* 2a, 3a, 5a-11a). The Union's authority to collect unpaid benefit contributions for the trust funds is conferred by the collective bargaining agreement itself. (App., *infra,* 8a, 9a, 11a). For claims arising under a labor agreement, the Union serves as the legal bargaining agent for individual members. Indeed, under the duty of fair representation arising from its role as bargaining agent, the Union is obliged to enforce its agreements unless justifiable reasons exist for not taking action. Because the Union's claims are grounded on a collective

bargaining agreement, the Union has standing to assert them on behalf of its members.

In view of the foregoing, the Union reiterates its request that the petition be granted.

Respectfully submitted,

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March 30, 2001

APPENDIX A
TO
PETITIONER'S REPLY MEMORANDUM

COMPLAINT FOR FORECLOSURE OF LABOR LIEN AGAINST PUBLIC WORKS CONTRACT PERFORMANCE BOND AND RETAINED PERCENTAGE
King County Superior Court

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 46,
Plaintiff,

v.

TRIG ELECTRIC CONSTRUCTION CO., a Washington Corporation; LYDIG CONSTRUCTION, INC.; FIDELITY AND DEPOSIT COMPANY OF MARYLAND; and DEPARTMENT OF GENERAL ADMINISTRATION,
Defendants.

No. 98-2-26652-0 SEA

Filed November 3, 1998

Plaintiff alleges:

1. Plaintiff International Brotherhood of Electrical Workers, Local Union No. 46 ("Union") is a labor organization operated under the federal labor laws. Plaintiff maintains its offices in Seattle, Washington.

2. Defendant Trig Electrical Construction Co., Inc. ("Trig") is an electrical contractor that performed subcontracting work on the Archives/BCC Building, Bellevue, Washington, Project No. 94-021H.

3. The general contractor for the Archives/BCC Building project is defendant Lydig Construction, Inc.

4. The defendant Fidelity & Deposit Company of Maryland is an insurance company doing business in the State of Washington. Under the laws of the State of Washington (RCW 39.08 et seq.) and under Bond No. CMB08047662 between the surety and Lydig Construction, Inc., the surety has agreed to pay unpaid wages, fringe benefit contributions, liquidated damages and interest to the plaintiff Union on behalf of the employees of its subcontractors who performed work on the Archives/BCC Building project at Bellevue, Washington, Project No. 94-021H.

5. The Department of General Administration contracted with Lydig Construction, Inc. for work on the Archives/BCC Building project. A retainage has been withheld on this project under RCW 60.28.010.

6. At all times material to the claims asserted in this action, defendant Trig and the plaintiff Union were parties to a collective bargaining agreement which, in material part, contains the provisions set forth in Exhibit A to this complaint.

7. The plaintiff Union believes and therefore alleges that Trig has employed employees who are covered by the labor agreement, but has failed and refused to pay wages and to make the required monthly fringe benefit contributions for such employees who performed labor on the aforementioned project, timely. Trig owes $45,142.07 in unpaid contributions, $8,572.30 in liquidated damages and $3,762.00 in interest (calculated through October 31, 1998) plus costs and attorneys' fees for the months of December 1997 and January 1998.

8. The Notice of Claim was filed on March 25, 1998 with the Department of General Administration, and a copy is attached as Exhibit B. A First Amended Notice of Claim was filed on July 22, 1998, and a copy is also attached as Exhibit C. This action to foreclose on the aforementioned claim is commenced more than thirty days but less than four months from the date of such filing under the laws of the State of Washington.

9. In accordance with the provisions of RCW 39.12.050(1) and RCW 30.08.010, et seq., the Union, as the exclusive representative of the employees of Trig, is entitled to recovery of the claims set forth above, in addition to costs and expenses of suit, from the proceeds of the payment and performance bond No. CMB08047662 issued by Fidelity & Deposit Company of Maryland to Lydig Construction, Inc. for the Archives/BCC Building project at Bellevue, Washington, Project No. 94-021H.

10. In accordance with the provisions of RCW 39.12.050(1) and RCW 60.28.010, et seq., the Union is entitled to recovery of the claims set forth above in addition to costs and expenses of suit from the retained percentage withheld from Lydig Construction, Inc. by the Department of General Administration.

WHEREFORE, the Union prays for a money judgment as follows:

(a) Judgment against the surety, Fidelity & Deposit Company of Maryland, for the full amount of contributions, liquidated damages, interest, reasonable attorneys' fees and costs and expenses of suit found to be owing to the plaintiff Union to the date of judgment herein;

(b) Judgment against the Department of General Administration and an order foreclosing lien of the claims herein against the retained percentage withheld from Lydig Construction, Inc. for the full amount of contributions, liquidated damages, interest, reasonable attorneys' fees and costs and expenses of suit to be owing to the plaintiff Union No. 46 to the date of judgment herein; and

(c) For such other and further relief as the court deems just and equitable.

DATED this 27th day of October, 1998.

/s/

Michael H. Korpi, WSBA #12711
DONALDSON, KIEL & McKENZIE, P.S.
Attorneys for Plaintiff

IBEW LOCAL UNION NO. 46

COLLECTIVE BARGAINING AGREEMENT*

Effective July 1, 1991 Through May 31, 1994 (Extended to May 31, 1998)

APPRENTICESHIP AND TRAINING

* * *

Section 3.19 The parties to this agreement shall be bound by the Joint Apprenticeship and Training Trust Fund Agreement which shall conform to Section 302 of the Labor Management Relations Act of 1947, as amended, ERISA and other applicable regulations.

The Trustees authorized under this Trust Agreement are hereby authorized to determine the reasonable value of any facilities, materials, or services furnished by either party. All funds shall be handled and disbursed in accordance with the Trust Agreement.

Section 3.20 All Employers subject to the terms of this agreement shall contribute twelve (12) cents for each hour (increased to seventeen (17) per hour November 28, 1994, twenty (20) cents per hour November 27, 1995, and twenty three (23) cents per hour June 1, 1996) worked by all Journeymen and indentured Apprentices. This sum shall be due the trust fund by the same date as is their payment to the NEBF under the terms of the employees benefit agreement.

*Exhibit A to Complaint

ARTICLE IV
FRINGE BENEFITS

Section 4.02 (a) **National Electric Benefit Fund.** It is agreed that in accord with the National Employees Benefit Agreement of the National Electrical Benefit Fund (NEBF), as entered into between the National Electrical Contractors Association and the International Brotherhood of Electrical Workers on September 3, 1994, as amended, and now delineated as the restated Employees Benefit Agreement and Trust, that unless authorized otherwise by the NEBF the individual employer will forward monthly to the NEBF's designated Local Collection Agent an amount equal to three percent (3%) of gross monthly labor payroll paid to, or accrued by the employee in this bargaining unit and a complete payroll report prescribed by the NEBF. The payment shall be made by check or draft and shall constitute a debt due and owing to the NEBF on the last day of each calendar month, which may be recovered by suit initiated by the NEBF or its assignee. The payment and the payroll report shall be mailed to reach the office of the appropriate local collection agent not later than fifteen (15) days following the end of each calendar month.

The individual employer hereby accepts, and agrees to be bound by, the restated Employees Benefit Agreement and Trust. An individual employer who fails to remit as provided above shall be additionally subject to having this agreement terminated upon seventy-two (72) hours notice in writing upon being served by the Union, provided the individual Employer fails to show satisfactory proof the required payment has been paid to appropriate local collection agent.

The failure of an individual employer to comply with the applicable provision of the Restated Employees Benefit Agreement and Trust shall also constitute a breach of their Labor Agreement.

Section 4.03 (a) **Health and Welfare**. Effective July 1, 1991 each Employer party to this agreement agrees to contribute on July 1, 1991 $1.435, on 12/1/91 $1.585, on 6/1/92 $ 1.735, on 12/1/92 $1.885, on 6/1/93 $2.035, on 12/1/93 $2.585, on 11/28/94 $2,636, on 11/27/95 $2.705, on 6/1/96 $2.805, and on 6/1/97 $2.88 for each hour worked by each employee performing work covered by this agreement to the Local Union No. 46 , IBEW Health and Welfare Trust Fund, a jointly trusted welfare trust created pursuant to Section 302(c) of the Labor-Management relations Act of 1974 (Taft-Hartley). The one-half (1/2) cents per hour increase shall be used to pay for FICA claims against Employers.

(b) Payment shall be due on the fifteenth of the month following the month in which the hours were worked. Each remittance shall be accompanied by a form which will be made available for this purpose.

(c) Each Employer party to this agreement agrees to be bound by the terms and provisions of the Trust Agreement governing the Local Union No. 46, I.B.E.W. Health and Welfare Trust Fund, effective January 1, 1976, and all amendments or revisions hereafter adopted, and further agrees to accept as its representatives the current Employer Trustees and their lawfully appointed successors.

(d) In addition to the remedies provided in the aforementioned Trust Agreement in the event of delinquency in the payment of contributions required by this agreement, employers who fail to remit regularly shall be subject to having this agreement terminated upon seventy-two (72) hours notice in writing, being served on the employer by the Union, provided the Employer fails to show proof that the delinquent payments have been paid to the Trustees of the Puget Sound Electrical Workers Health and Welfare Trust Fund.

(e) When an Employer is delinquent in filing the contribution report or paying promptly the Health and Welfare contribution required, it is agreed that the Union shall take such action as appears to the Union to be appropriate to effect collection, including the removal of employees covered under the Collective Bargaining Agreement.

(f) The failure of an Employer to comply with the applicable provisions of the Trust Agreement governing the Puget Sound Electrical Workers Health and Welfare Trust Fund shall also constitute a breach of this labor agreement.

(g) In no event, however shall the Trustees be obligated to pursue the collection of delinquent contributions through the grievance-arbitration procedures provided in this labor agreement.

Section 4.04 (a) **Local Union Pension**

(1) Each Employer party to this agreement agrees to contribute the following amounts for each hour worked by each employee performing work covered by this agreement. Except as provided for Apprentices, to the Puget Sound Electrical Workers Pension Trust, a jointly trusted pension trust created pursuant to Section 302(c) of the Labor-Management Relations Act of 1947 (Taft-Hartly). Effective July 1, 1991 the contribution shall be two dollars and thirty cents($2.30). Effective 6/1/92 the contribution shall be two dollars and forty cents($2.40), effective 12/1/92 the contribution rate shall be two dollars and fifty-six cents ($2.56), effective 6/1/93 the contribution rate shall be two dollars and seventy-three cents ($2.73), effective 6/1/96 the contribution rate shall be three dollars and twenty four cents ($3.24), and effective 6/1/97 the contribution rate shall be three dollars and thirty-four cents ($3.34) and the pension shall be $3.34 until the end of this Agreement.

(2) Effective 7/1/91, an Annuity plan will be established with a contribution rate of $0.35 per hour for a defined contribution plan. Effective 5/3/94 $0.55, effective 11/28/94 $0.60, effective 5/29/95 $0.70, effective 11/27/95 $0.75 and effective 6/1/96 $0.80.

* * *

(b) Payment shall be due on the fifteenth (15th) of the month following the month in which the hours were worked. Each remittance shall be accompanied by a form which will be made available for this purpose.

(c) Each Employer party to this Agreement agrees to be bound by the terms and provisions of the Trust Agreement governing the Puget Sound Electrical Workers Pension Trust effective June 1, 1973 and all amendments or revisions hereafter adopted and further agrees as its representatives the current Employer Trustees and their lawfully appointed successors.

(d) In addition to the remedies provided in the aforementioned Trust Agreement in the event of delinquency in the payment of contributions required by this agreement, Employers who fail to remit regularly shall be subject to having this agreement terminated upon seventy-two(72) hours notice in writing, being served on the Employer by the Union, provided the Employer fails to show proof that the delinquent payments have been paid to the Trustees of the Puget Sound Electrical Workers Pension Trust.

(e) When an Employer is delinquent in filing the contribution report or paying promptly the pension contribution required, it is agreed that the Union shall take such action as appears to the Union to be appropriate to effect collection, including removal of employees covered under the Collective Bargaining Agreement.

(f) The failure of an Employer to comply with the applicable provisions of the Trust Agreement governing the Puget Sound Electrical Workers Pension Trust shall also constitute a breach of this labor agreement.

(g) In no event, however, shall the Trustees be obligated to pursue the collection of delinquent contributions throughout the grievance-arbitration procedure provided in this labor agreement.

Section 4.05 Vacation and Allowance Plan. All Employers subject to this collective bargaining agreement shall withhold from the pay of each employee, as a vacation allowance, an amount equal to six percent (6%) of the hourly rate of pay (as set forth in Section 3.08 (a) nearest the one cent ($.01) for each compensable hour worked under the terms and conditions of this collective bargaining agreement. On all overtime work the vacation allowance be withheld on the straight time hourly rate only. The Vacation Allowance Plan shall be administered by the Trustees of the Puget Sound Electrical Workers Health and Welfare Fund.

Each Employer party to this agreement agrees to be bound by the terms and provisions of the Trust Agreement governing the Local Union No. 46, IBEW Health and Welfare Trust Fund, effective January 1, 1976, and all amendments or revisions hereafter adopted, and further agrees to accept as its representatives the current employer Trustees and the lawfully appointed successors.

(a) Vacation allowance shall be paid to all employees who are directed by the individual Employer to work on jobs outside of the jurisdiction on Local Union No. 46, IBEW.

(b) Should an Employer direct an employee to work in the jurisdiction of another Local Union having an established vacation allowance plan in its collective bargaining agreement

they shall not be required to contribute the vacation allowance, since the Employer will be required to contribute to a vacation allowance in accordance with that particular Local Union's vacation allowance. If it is less than the Local Union No. 46 agreement, the Employer shall pay the difference to Local Union No. 46, Vacation Plan, for said employee's account.

(c) This vacation allowance shall be withheld from the employee's weekly pay and shall be sent on a monthly transmittal to the designated depositor.

* * *

(n) Employers who fail to remit regularly shall be subject to having this agreement terminated upon seventy-two (72) hours notice in writing being served on the Employer by the Union, provided the Employer fails to show proof that the delinquent payments have been paid. When an Employer is delinquent in filing the vacation report or paying promptly the vacation allowance required, it is agreed that the Union shall take such action as appears to the Union to be appropriate to effect collection.

(o) The failure of an individual Employer to comply with the applicable provisions of the Vacation Allowance Plan shall also constitute a breach of this labor agreement.